(25,630)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 800.

JAMES H. COCHNOWER, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print
Petition and amended petition	1	1
Traverse	7	4
Argument and submission of case	8	4
Findings of fact, conclusion of law, and opinion of the court	9	4
Judgment of the court	16	11
Application of claimant for and allowance of appeal to the Supreme Court of the United States	16	12
Certificate of clerk	17	12

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 12, 1917.

1 I. *Petition and Amended Petition.*

In the Court of Claims.

No. 32862.

JAMES H. COCHNOWER
vs.
THE UNITED STATES.

On July 7, 1914 the claimant filed his original petition. Subsequently, to wit, on July 2, 1915, the claimant, by leave of Court, filed his amended petition which is as follows:

Amended Petition. Filed July 2, 1915.

To the Chief Justice and Judges of the Court of Claims:

The claimant respectfully represents and shows:

1. Claimant is a citizen of the United States and a resident of the State of New York.

2. Claimant has held the following positions in the customs service of the United States at the port of New York: He was appointed night inspector at Two and 50/100 ($2.50) dollars per diem, June 10, 1879. He was appointed day inspector at Four ($4.00) dollars per diem, September 23, 1883. The latter position was abolished February 28, 1901. He was detailed as Laborer at Two and 50/100 ($2.50) dollars per diem, September 10, 1902. He was appointed storekeeper at Fourteen hundred ($1,400) dollars per annum July 13, 1903. He was appointed day inspector at Five ($5) dollars per diem, June 13, 1908, and he was demoted or reduced as such day inspector to Four ($4) dollars per diem on July 1, 1910.
2 Since the said date of July 1, 1910, he has served at said port as said day inspector at Four ($4) dollars per diem, and is still so serving.

3. Claimant was and is at all times hereinbefore and hereinafter mentioned, an employee of the Civil Service of the United States under the Act of Congress of January 16, 1883, known as the Civil Service Law.

4. The Acts of Congress of March 2, 1799 (1 Stat., 706), and April 26, 1816 (3 Stat., 306), now Rev. Stat., Sec. 2733, provided that each inspector of customs should receive Three ($3.00) dollars per diem, and the Acts of April 29, 1864 (13 Stat., 61), and July 23, 1866 (14 Stat., 208), now Rev. Stat., Sec. 2737, authorized the Secretary of the Treasury to increase the compensation of inspectors of customs in such ports as he might think it advisable so to do and designate by adding to the compensation of such officers a sum not exceeding one ($1.00) dollar per diem. Under the provisions of said statute the Secretary of the Treasury, June 6, 1864, increased the

compensation of all inspectors in the port of New York, as well as in other large ports, to Four ($4.00) dollars per diem.

By the Act of December 16, 1902 (32 Stat., 753), the Secretary was authorized to increase the compensation of inspectors of customs at the port of New York by adding to their compensation of Four ($4.00) dollars per diem a sum not exceeding One ($1.00) dollar per diem, which additional compensation was provided for work performed by them at unusual hours for which no compensation had been allowed, and included work performed by them at night in examining passengers' baggage, and also as reimbursement for expenses incurred by them from meals and transportation while in the discharge or performance of their official duties. Under the
3 provisions of said act the Secretary of the Treasury on January 5, 1903, increased the compensation of all inspectors of customs in the port of New York to Five ($5.00) dollars per diem irrespective of the nature and character of services performed by the said inspectors. All of the said inspectors of customs at the said port of New York received Five ($5.00) dollars per diem from the said date of January 5, 1903, until the first day of October, 1905. The sum of Five ($5.00) dollars per diem was paid all of these inspectors during the period elapsing from January 5, 1903, to October 1, 1905, even though numbers of the said inspectors did not render service at night in examining passengers' baggage, nor did they incur expenses for meals and transportation while in the discharge or performance of their official duties other than what was necessarily incurred by them in going to and from their posts of duty. On the first day of October, 1905, the Secretary of the Treasury undertook to reduce the compensation of all the inspectors of customs in the said port of New York to Four ($4.00) dollars per diem, and they were paid the latter amount for the months of October, November and December, 1905, but the said Secretary of the Treasury was advised that he had no authority to reduce a salary fixed by law, and so on the eighth day of January, 1906, he increased or restored the compensation of the inspectors of customs at said port to Five ($5.00) dollars per diem, effective January 1, 1906, to comply with the existing law. The subject was brought to the attention of Congress and that body enacted the Act of June 30, 1906 (34 Stat., 634), which appropriated Thirty-one thousand ($31,000) dollars, or so much thereof as might be necessary, to pay the inspectors of customs at the port of New York the difference between the per diem salary
4 of Four ($4.00) dollars paid them during the months of October, November and December, 1905, and their proper per diem salary for the same period (five dollars per diem) in accordance with the Act of Congress of December 16, 1902. Congress further enacted the Act of March 4, 1907 (34 Stat., 1373), which said act appropriated the sum of Nine hundred and forty ($940) dollars additional to enable the Secretary of the Treasury to pay to certain inspectors of customs at the port of New York, the difference between the per diem salary of Four ($4.00) dollars paid them during the months of October, November and December, 1905, and their proper per diem salary of Five ($5.00) dollars for the same period.

Claimant was appointed day inspector at said port June 13, 1908, at Five ($5.00) dollars per diem, as averred in the preceding paragraph. The act of March 4, 1909 (35 Stat., 1065), authorized the Secretary of the Treasury to increase and fix the compensation of inspectors of customs as he might think advisable, not to exceed the rate of Six ($6.00) dollars per diem, and in all cases where the maximum compensation is paid, no allowance shall be made for meals or other expenses incurred by inspectors when required to work at unusual hours. The said act of March 4, 1909, contemplated and intended that the compensation of all inspectors of customs at the port of New York should be increased to Six ($6.00) dollars per diem. The Secretary of the Treasury, July 1, 1910, increased the compensation of some of the inspectors at the said port of New York, but he did not increase claimant's compensation. On the contrary, claimant's compensation was reduced to Four ($4.00) dollars per diem.

Claimant has not been paid for his services as day inspector
5 more than Four ($4.00) dollars per diem since he was demoted or reduced to that rate, July 1, 1910, as is alleged in the previous paragraph. Claimant avers that the said act of March 4, 1909 (35 Stat., 1065), conferred no authority upon the Secretary of the Treasury to decrease claimant's compensation.

5. Claimant was and is entitled to compensation for the services rendered by him in the following amount over and above what he received therefor: Two dollars per diem from July 1st, 1910, to and including June 30th, 1915, eighteen hundred and twenty-six (1,826) days, the whole amount due him and unpaid being three thousand six hundred and fifty-two dollars ($3,652). The only action that has been taken on this claim in the departments, or in the Congress of the United States is that set forth in this petition except that the claimant protested to the Collector of Customs for the port of New York against his demotion to Four ($4.00) dollars per diem on July 1st, 1910.

6. Claimant is the sole owner of this claim, no other person or corporation is interested therein, and no assignment or transfer of the claim, or any part thereof, or interest therein, has been made.

7. Claimant is justly entitled to the amounts herein named from the United States, as he is advised and believes, after allowing all just credits and set-offs.

Wherefore, he prays judgment against the United States for the sum of Three thousand six hundred and fifty-two dollars ($3,652).

SPOOR & RUSSELL,
Attorneys of Record.

DUDLEY & MICHENER,
Of Counsel.

6 STATE OF NEW YORK,
County of New York, ss:

Personally appeared before me, a notary public in and for the County of New York, William E. Russell, who being sworn according to law, deposes and says that he is a member of the partnership of Spoor & Russell, which partnership has been duly authorized by power

of attorney to represent the claimant and verify pleadings in this case, that he has read and understands the foregoing petition, and that the matters and things therein stated are true in substance and in fact as he is informed and believes.

WILLIAM E. RUSSELL.

Subscribed and sworn to before me this 1st day of July, A. D. 1915.

[SEAL.] GEORGE E. BROWN,
Notary Public, Richmond County.

Certificate filed in New York County, No. 179.
New York Register No. 7223.
Term expires March 30, 1917.

7 II. *Traverse. Filed April* 13, 1916.

In the Court of Claims of the United States, December Term, A. D. 1915.

No. 32862.

JAMES H. COCHNOWER
vs.
THE UNITED STATES.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

HUSTON THOMPSON,
Assistant Attorney General.
J. W. T.

8 III. *Argument and Submission of Case.*

On April 13, 1916 argument on behalf of the claimant was begun by Mr. W. E. Russell. On April 14, 1916 Mr. Russell continued his argument; Messrs. H. D. Jacob and William Hitz argued in behalf of the defendants; Mr. Russell concluded for the claimant and the case was submitted.

9 IV. *Findings of Fact, Conclusion of Law and Opinion of the Court. Filed October* 16, 1916.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The claimant, James H. Cochnower, is a citizen of the United States and a resident of the State of New York.

II.

Claimant has held the following positions in the customs service of the United States at the port of New York: He was appointed night inspector at $2.50 per diem June 10, 1879. He was appointed day inspector at $4 per diem September 23, 1883. The latter position was abolished February 28, 1901. He was detailed as laborer at $2.50 per diem September 10, 1902. He was appointed storekeeper at $1,400 per annum July 13, 1903. He was appointed day inspector at a compensation of $5 per diem July 13, 1908, and he was paid at that rate until July 1, 1910.

III.

In June, 1910, the collector of the port of New York, acting under the provisions of the act of March 4, 1909, 35 Stats., 1065, recommended to the Secretary of the Treasury the classification of the inspectors of customs at that port, with a compensation of $4, $5, and $6 per diem each, respectively, and a subdivision of the classes mentioned into junior and senior. With that purpose in view the collector appointed a committee of competent persons, who were instructed to sit as an examining board and call before the board each inspector of customs, and taking into consideration his age, physical condition, length of service, efficiency, character, and qualifications, to grade him accordingly, and submit a report and recommendations based on such examination. They recommended that the corps of inspectors be divided into 3 classes, with subdivision of junior and senior in one class, namely, class 2, with compensation at the rate of $4 per diem; class 4, with compensation at the rate of $5 per diem; and class 5, with compensation at the rate of $6 per diem, to date from July 1, 1910.

When the changes were reported to the Secretary by the Collector they were approved, "to take effect from date of new oath." The Secretary's order recited: "Inspectors, class 4, at $5 per diem each, to be inspectors, class 5, new offices, with compensation at the rate of $6 per diem each, the positions thus vacated to be abolished," and then follows the names of 52 inspectors; "inspectors, class 4, at $5 per diem each, to be inspectors, class 2, new offices, with compensation at the rate of $4 per diem each, the positions thus vacated to be abolished"—then follows the names, among them that of the plaintiff; and further recites certain other changes. The order further recites: "As further recommended by you, authority is hereby granted for the employment of 19 inspectors, class 2, at $4 per

diem each, to be in lieu of 19 inspectors, class 4, heretofore mentioned, the latter positions having been abolished.

"The above reorganization will result in adding 52 inspectors, class 5, at $6 per diem each; 52 inspectors, class 2, at $4 per diem each; and the abolition of the positions of 104 inspectors, class 4, at $5 per diem each, all of which will result in no increase or decrease in the expenses of your district."

On June 30, 1910, the plaintiff, with a number of others, was ordered to report at an appointed room in the customhouse at 9 o'clock, July 1. They did so, and a deputy collector directed them to be sworn, and administered the oath of office. They were ordered to report to another room, which they did, and plaintiff was handed an order reciting his appointment, with the approval of the Secretary of the Treasury, as inspector in class 2, service to take effect July 1, 1910. On being notified of the reduction of his compensation the plaintiff protested.

IV.

The claimant was an employee in the custom service under the civil service laws.

V.

Inspectors at the port of New York were being paid $4 per diem at the time the act of December 16, 1902, 32 Stats., 753, was passed. That act reads as follows:

"That the Secretary of the Treasury is hereby authorized to increase the compensation of inspectors of customs at the port of New York as he may think advisable and proper, by adding to their present compensation a sum not exceeding one dollar per day, which additional compensation shall be for work now performed by them at unusual hours, for which no compensation is now allowed, and shall include work performed by said inspectors at night in examining passengers' baggage, and also as reimbursement for expenses incurred by them for meals and transportation while in the discharge or performance of their official duties."

11 From and after January 5, 1903, the compensation of all of the inspectors of customs at said port was increased to $5 per diem.

Appropriations for the expense of the customs service are made in lump sums upon estimates furnished by the Secretary of the Treasury.

On or about the 30th day of September, 1905, the Secretary of the Treasury authorized a reduction in the compensation of inspectors at the port of New York from $5 to $4 per day, effective October 1. Thereafter, being advised that he could not make the reduction, he restored the said compensation on or about the 8th day of January, 1906, effective January 1, 1906; and from the latter date and until the action of the Secretary under the said act of March 4, 1909, said inspectors were paid at the rate of $5 per diem.

Early in 1906 a bill was introduced in Congress for the purpose of

allowing inspectors at the port of New York additional compensation of $1 per diem each from October 1, 1905, to December 31, 1905, being the $1 reduction in the said order of the Secretary. The Treasury Department recommended the passage of the bill, with the suggestion that the sum be made payable out of any money in the Treasury not otherwise appropriated rather than out of the current appropriation for "Expenses of collecting the revenue from customs," for the reason that it would probably result in a deficiency in that appropriation, and the said bill became a law as a part of the general deficiency bill, act of June 30, 1906, 34 Stats., 634, 636, as follows:

"To pay the inspectors of customs at the port of New York the difference between the per diem salary of four dollars paid them during the months of October, November, and December, nineteen hundred and five, and their proper per diem salary for the same period (five dollars per annum), in accordance with the act of Congress approved December sixteenth, nineteen hundred and two, thirty-one thousand dollars, or so much thereof as may be necessary."

A similar bill was passed March 4, 1907, 34 Stat., 1373.

The claimant was appointed day inspector at said port June 13, 1908, at $5 per diem.

Conclusions of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant is not entitled to recover, and his petition is therefore dismissed.

Opinion.

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

The plaintiff is an inspector of customs at the port of New York, which position he held on July 1, 1910, and for some time prior to that date. On June 10, 1879, he was appointed a night inspector at $2.50 per diem. He became day inspector in September, 1883, at $4 per diem. He was detailed as a laborer at $2.50 per diem in September, 1902, and was appointed storekeeper at $1,400 per annum in July 1903. In June, 1908, he was appointed day inspector of customs at $5 per diem. It thus appears that he has been in the customs service for a great many years in one capacity or another. Under
a plan of reorganization and classification of the force at the
12 port of New York adopted by the collector, with the approval
of the Secretary of the Treasury, and from July 1, 1910, the plaintiff was continued as a day inspector at the compensation of $4 per diem, at which rate he has been paid.

Plaintiff filed his petition in this court on July 6, 1914, and his amended petition was filed July 2, 1915. By the latter he claims "two dollars per diem from July 1, 1910, to and including June 30, 1915." In other words, he claims that, notwithstanding the action of the administrative officers fixing his compensation at $4 per diem from July 1, 1910, he is entitled to $6 per diem from that date, and,

having received $4 per diem, that he should be awarded judgment for the difference. The plaintiff was one of several hundred inspectors at the port of New York.

After the act of March 4, 1909, 35 Stats., 1065, and acting under its provisions, the collector at said port caused a reorganization and classification of the inspectors, whereby some were to be paid from and after July 1, 1910, at the rate of $4 per diem, some at $5 per diem, and others at $6 per diem. With that purpose in view, the collector appointed a committee of competent persons, who were instructed to sit as an examining board and to call before it each inspector of customs, and, taking into consideration his age, physical condition, length of service, efficiency, character, and qualifications to grade him according to his test and submit a report and recommendations based on this examination. The committee having complied with their instructions submitted a report, which was approved by the collector, with the result that the corps of inspectors of customs at the port of New York "was divided into three classes, viz, class 2, with compensation at the rate of $4 per diem each; class 4, with compensation at the rate of $5 per diem each; class 5, with compensation at the rate of $6 per diem each." The changes were duly approved by the Secretary of the Treasury, whose order recited: "Inspectors, class 4, at $5 per diem each, to be inspectors, class 5, new offices, with compensation at the rate of $6 per diem each, the positions thus vacated to be abolished" (followed by the names), and "Inspectors, class 4, at $5 per diem each, to be inspectors, class 2, new offices, with compensation at the rate of $4 per diem each, the positions thus vacated to be abolished" (followed by the names, among which is that of plaintiff). Certain other changes were made, and the Secretary's order recited that "the above reorganization will result in adding 52 inspectors, class 5, at $6 per diem each; 52 inspectors, class 2, at $4 per diem each; and the abolition of the positions of 104 inspectors, class 4, at $5 per diem each, all of which will result in no increase or decrease in the expenses of your district."

The plaintiff duly executed his oath of office, and when informed of the reduction of compensation from $5 to $4 per diem he protested against the same. He contends that the Secretary was not authorized to reduce his per diem from $5 to $4, and, further, as stated by his counsel, "that the power of the Secretary was to increase claimant's pay to an amount not exceeding $6, and that when the Secretary did increase the pay of certain inspectors on July 1, 1910, by operation of law claimant's salary was thereby increased." We cannot assent to either of these contentions. The acts, general and special, to
13 which our attention has been directed in the presentation of the case may be grouped as follows:

The Revised Statutes provide:

"Sec. 2733. Each inspector shall receive, for every day he shall be actually employed in aid of the customs, three dollars; * * *."

"Sec. 2737. The Secretary of the Treasury may increase the compensation of the inspectors of customs in such ports as he may think it advisable so to do, and may designate, by adding to the present

compensation of such officers, a sum not exceeding one dollar per day."

The act of March 3, 1881, 21 Stat., 429, provides:

"That hereafter the Secretary of the Treasury may appoint inspectors of customs at a compensation less than three dollars per day, when, in his judgment, the public service will permit."

The act of December 16, 1902, 32 Stat., 753, provides:

"That the Secretary of the Treasury is hereby authorized to increase the compensation of inspectors of customs at the port of New York as he may think advisable and proper, by adding to their present compensation a sum not exceeding one dollar per day, which additional compensation shall be for work now performed by them at unusual hours, for which no compensation is now allowed, and shall include work performed by said inspectors at night in examining passengers' baggage, and also as reimbursement for expenses incurred by them for meals and transportation while in the discharge or performance of their official duties."

The act of March 4, 1909, 35 Stat., 1065, entitled "An act fixing the compensation of certain officials in the customs service and for other purposes," provides:

"That the Secretary of the Treasury be, and he is hereby, authorized to increase and fix the compensation of laborers in the customs service, as he may think advisable, to a rate not exceeding eight hundred and forty dollars per annum."

"Sec. 2. That the Secretary of the Treasury be, and he is hereby, authorized to increase and fix the compensation of inspectors of customs, as he may think advisable, not to exceed in any case the rate of six dollars per diem, and in all cases where the maximum compensation is paid no allowance shall be made for meals or other expenses incurred by inspectors when required to work at unusual hours."

"Sec. 3. That the Secretary of the Treasury be, and he is hereby, authorized to increase and fix the compensation of deputy collectors, assistant appraisers and examiners of merchandise, examiners of tea, and examiners and special examiners of drugs, in the customs service, as he may think advisable, not to exceed in any case three thousand five hundred dollars per annum."

"Sec. 4. That the Secretary of the Treasury be, and he is hereby, authorized to increase and fix the compensation of deputy naval officers and deputy surveyors of customs, as he may think advisable, not to exceed in any case three thousand dollars per annum."

"Sec. 6. That the Secretary of the Treasury be, and he is hereby, authorized to increase and fix the compensation of assistant weighers in the customs service, as he may think advisable, not to exceed in any case a rate of four dollars per diem."

14 "Sec. 8. That all laws and parts of laws inconsistent with this act are hereby repealed."

We are also referred to a provision in the act of June 30, 1906, 34 Stats., 636, applicable to inspectors of customs at the port of New York, reading as follows:

"To pay the inspectors of customs of the port of New York the

difference between the per diem salary of four dollars paid them during the months of October, November, and December, nineteen hundred and five, and their proper per diem salary for the same period (five dollars per diem), in accordance with the act of Congress approved December sixteenth, nineteen hundred and two, thirty-one thousand dollars, or so much thereof as may be necessary."

The act of March 4, 1907, 34 Stats., 1373, is similar to that of June 30, 1906, just quoted.

In connection with the foregoing the act of August 24, 1912, 37 Stats., 434, is important. By that act section 3687, Revised Statutes, providing a general appropriation for the expenses of the customs service, is repealed, and with the purpose of reducing the total cost of said service a reorganization of the service is directed. The President was authorized to reorganize the customs service, such reorganization to be communicated to Congress at its next regular session and "to constitute for the fiscal year 1914 and until otherwise provided by Congress the permanent organization of the customs service." In pursuance of that authority the President effected a plan of reorganization and reported the same to Congress March 3, 1913. (See United States Compiled Statutes, 1913, sec. 5327.) Under that plan there were established 49 customs collection districts "in lieu of all customs collection districts, ports, and subports of entry" then existing, and the compensation of officers and employees was stated. It is noticeable that this plan follows the classification of customs inspectors at the port of New York adopted, as above stated, in 1910, by providing for inspectors at $4, at $5, and $6 per diem. As this plan was by the terms of the act to be effective for the fiscal year 1914, commencing July 1, 1913, it is manifest that the plaintiff's claim, if any he has, must be confined to the period between July 1, 1910, and July 1, 1913.

It is conceded that where the statute creates an office and fixes the salary the officer discharging its duties is entitled to the salary fixed by the law. Glavey's case, 182 U. S., 595. The salary cannot be reduced by Executive order without legal authority therefor. Andrews' case, 240 U. S., 90. The question is whether the Secretary had authority under the act of 1900 to fix plaintiff's per diem compensation at $4. When that act was passed the compensation of inspectors of customs was different at different ports. The law authorized a compensation of $3 per day, and by the act of 1881 the Secretary could employ inspectors at less than $3 per day. He had been given authority (sec. 2738 Revised Statutes) to increase the compensation of the inspectors at such ports as he might designate, not exceeding $1 per day; and by the act of 1902 he was authorized to make another increase so far as the port of New York was concerned. It thus appears that inspectors of customs were being paid at various rates—$3 or less per day, $4 per day, and at New York they were receiving $5 per day. The act of 1909 deals with several classes of customs officials: Laborers, inspectors, deputy collectors, assistant appraisers and examiners, deputy surveyors, assistant weighers, etc. As to each of these it is provided that the Secretary of the Treasury could increase and fix their compensation not

to exceed a stated maximum in any case. The act manifests a legislative purpose to provide a complete scheme whereby the compensation of customs employees could be regulated. As appropriations for the expense of collecting customs had long been made in a lump sum upon estimates furnished by the Treasury Department the matter of adjusting the compensation in the different cases was left with the Secretary, with the limitation that it should not exceed the amount stated in the act.

The comptroller has held that the act of 1909 was designed to supersede prior legislation on the subject. 22 Comp. Dec., 445. We think that is the correct view. It expressly repeals all laws and parts of laws inconsistent with its provisions. It vested in the Secretary the authority to readjust or change the compensation of the officers named, "as he may think advisable," not to exceed a maximum stated. It does not require that all inspectors at a given port be paid the same compensation. On the contrary, as appears from section 2 of the act, it prescribes the maximum rate that can be allowed in any "case," and recognizes a right to pay that maximum in some cases while withholding it in others. For instance, where the maximum is paid no allowance for other expenses can be made. The act refers the matter of compensation of employees in the customs service largely to the judgment of the administrative officers. The number of inspectors to be employed had been for a long time left to the Secretary's discretion. When, therefore, acting under the authority of the act of 1909, the collector of the port, with the approval of the Secretary, took steps to properly classify the inspectors at that port, and his plan of reorganization and classification was approved by the Secretary, we think the administrative action should not be interfered with unless plainly violative of official discretion. Ross case, 239 U. S., 530, 538. The regulation of the compensation to be paid within the maximum stated in the act was vested in the Secretary; the plan he adopted, so far as the inspectors at the port of New York were concerned, was reasonable, and appropriations based upon estimates conforming to said plan, and later to that adopted by the President under said act of 1912, have been repeatedly made.

We think that the plaintiff has no right of action, and his petition should be dismissed. And it is so ordered.

Judge Hay was not sitting when this case was heard.

16 V. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the 16th day of October, A. D., 1916, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendants, and do order, adjudge and decree that the claimant, James H. Cochnower, as aforesaid, is not entitled to recover and shall not recover any sum in this action of and from the United States; and that the petition in this cause be dismissed.

BY THE COURT.

VI. *Application of Claimant for and Allowance of Appeal to the Supreme Court of the United States.*

The claimant makes application for an appeal to the Supreme Court of the United States in the above entitled case.

SPOOR & RUSSELL,
Attorneys of Record.

DUDLEY & MICHENER,
Of Counsel.

Filed October 24, 1916.

Ordered: That the above appeal be allowed as prayed for.

BY THE COURT.

Oct. 24, 1916.

17 In the Court of Claims.

No. 32862.

JAMES H. COCHNOWER
vs.
THE UNITED STATES.

I, Samuel A. Putman, Chief Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact and conclusion of law and of the opinion of the Court; of the judgment of the Court; of the application of the claimant for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 25th day of October, A. D. 1916.

[Seal Court of Claims.]

SAMUEL A. PUTMAN,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 25,630. Court of Claims. Term No. 800. James H. Cochnower, appellant, vs. The United States. Filed November 29th, 1916. File No. 25,630.

Supreme Court, U. S.
FILED
MAR 4 1918
JAMES D. MAHER
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D., 1917.

No. [redacted]80

JAMES H. COCHNOWER,
Appellant,

vs.

THE UNITED STATES.

APPELLANT'S BRIEF.

WILLIAM F. PUSSELL,
SEWARD G. SPOOR,
LOUIS T. MICHENER,
PERRY G. MICHENER,
Attorneys for Appellant.

Subject Index.

	Page
STATEMENT OF THE CASE	1-4
Subject matter of controversy	1
Various positions held by Cochnower in customs service	2
Attempted reorganization in New York resulting in Cochnower's demotion	2, 3
Method of demotion	2, 3
Salaries paid to New York inspectors covering different periods	3
Reduction of New York inspectors to $4.00	3
Restoration of New York inspectors to $5.00	3
Appropriation by Congress to pay difference	3
Language of the Appropriation Act	3
Cochnower continued as inspector	4
Nature of action	4
RECORD OF PROCEEDINGS BELOW	4
ERRATA	4
ASSIGNMENT OF ERRORS	5
BRIEF OF ARGUMENT	5-49
I. Statutes and statutory rule for construction	5-13
II. Statutes in *pari materia* to be construed together	13-21
III. An executive officer may not change a salary fixed by statute	21-22
IV. No theory of waiver or estoppel bars appellant's rights	22

Page

V. The Court may refer to the history of the passage of an act through Congress to arrive at its true meaning 23-33

VI. When Congress re-enacts a statute it adopts the administrative construction of the previous statute in *pari materia* 34-35

VII. The contemporaneous construction of a doubtful statute is entitled to great weight . 35-36

VIII. Permissive language in a statute conferring rights on the public or third parties is deemed mandatory 36-37

IX. A subsequent general statute does not repeal a prior special statute 37-39

X. The legislature may declare the meaning of a previous act so as to bind the courts thereafter 40-43

XI. The Executive order of March 3, 1913 did not change the statutory salary for inspectors at the port of New York 44-49

APPENDIX 50-58

LIST OF CASES.

Adams vs. U. S., 20 C. Cls. 115 17

Alexander vs. Alexandria, 5 Cranch 1 13

Binns vs. U. S., 194 U. S. 486 23

Boswell vs. Coal Co., 217 Fed. 822 37

Converse vs. U. S., 21 How. 463 ..... 13, 14

Cope vs. Cope, 137 U. S. 682 40

Copper Queen Mining Co. vs. Arizona Board, 206 U. S. 474 34

Fairbanks vs. U. S., 181 U. S. 283 36

Glavey vs. U. S., 182 U. S. 595 ..... 21, 22

In re Anderson, 214 Fed. 662 38

Interstate Drainage & Investment Co. vs. Board of Com., 158 Fed. 270 11

Page

James vs. U. S., 202 U. S. 401 ..... 40, 42
Komada vs. U. S., 215 U. S. 392 ..... 34, 36
Koshkonong vs. Burton, 104 U. S. 668 40
Lavin vs. Board of Com.; 151 Ill. App. 236 ... 13
Lewis Pub. Co. vs. Morgan, 229 U. S. 288 23
Mosle *et al.* vs. Bidwell, 130 Fed. 334 .... 13, 23, 40
Mutual Life Ins. Co. vs. Hill, 193 U. S. 551 ... 38
Phelps vs. Hawley, 52 N. Y. 23 37
People vs. Land Com., 207 N. Y. 42 37
Ralston vs. Crittendon, 13 Fed. 508 37
Rodgers vs. U. S., 185 U. S. 83 38
Rosencrans vs. U. S., 165 U. S. 257 38
Shallus vs. U. S., 162 Fed. 653 23
Standard Oil vs. U. S., 221 U. S. I 23
St. Louis & Iron Mt. Ry. vs. Craft, 237 U. S. 648 23
State vs. Capdeville, 140 La. 229 38
Stockdale vs. Ins. Co., 20 Wall. 323 40
Supervisors vs. U. S., 4 Wall. 435 37
Swigart vs. Baker, 229 U. S. 187 ..... 23, 40
Tiger vs. Western Investment Co., 221 U. S. 286 40
U. S. vs. Andrews, 240 U. S. 90 21
U. S. vs. Falk, 204 U. S. 143 ..... 34, 36
U. S. vs. Freeman, 3 How. 556 ..... 13, 14, 40
U. S. vs. Hermanos, 209 U. S. 337 ..... 34, 36
U. S. vs. Johnston, 124 U. S. 236 36
U. S. vs. Jackson, 143 Fed. 782 ..... 11, 12
Village of Kent vs. U. S., 51 C. C. A. 189 37
Wabash R. R. Co. vs. Pearce, 192 U. S. 179 .. 11
Washington Trust Co. vs. Dunaway, 169 Fed. 37 38
Washington vs. Miller, 235 U. S. 422 38
Whipple vs. Christian, 80 N. Y. 523 38

LIST OF STATUTES.

	Page
Act of July 31, 1789, c. 5, sec. 29, 1 Stats. 45	5, 14
Act of March 3, 1797, c. 9, sec. 3, 1 Stats. 503	6, 15
Act of March 2, 1799, c. 23, sec. 2, 1 Stats. 707	6, 15
Act of April 26, 1816, c. 95, 3 Stats. 306	6, 15
Act of April 29, 1864, c. 71, 13 Stats. 61	7, 16
Act of March 2, 1865, c. 73, sec. 5, 13 Stats. 460	7, 16
Act of July 23, 1866, c. 208, sec. 9, 14 Stats. 208	8, 16
Act of March 3, 1881, c. 132, 21 Stats. 429	8. 17
Act of December 16, 1902, c. 2, 32 Stats. 753	8, 18
Act of June 30, 1906, c. 3912, 34 Stats. 636	9, 18, 41
Act of March 4, 1907, c. 2919, 34 Stats. 1373	9
Act of May 27, 1908, c. 200, 35 Stats. 328	31
Act of March 4, 1909, c. 298, 35 Stats. 910	31
Act of March 4, 1909, c. 299, 35 Stats. 968	31
Act of March 4, 1909, c. 314, sec. 2, 35 Stats. 1065	9-10, 19
Act of June 25, 1910, c. 385, 36 Stats. 781	31
Act of March 4, 1911, c. 285, 36 Stats. 1393	33
Act of August 24, 1912, c. 355, 37 Stats. 434	10, 33, 44
Act of August 26, 1912, c. 408, 37 Stats. 598	33
Act of June 23, 1913, c. 3, 38 Stats. 23	47
Act of October 22, 1913, c. 32, 38 Stats. 211	33
Act of August 1, 1914, c. 223, 38 Stats. 623	48
Act of July 29, 1914, c. 215, 38 Stats. 565	33. 47
Act of March 3, 1915, c. 75, 38 Stats. 836	48
Book of Estimates, 3 H. doc., 61st cong., 2nd sess., p. 397	32
Book of Estimates, 3 H. doc., 61st cong., 3rd sess., p. 361	33

Page

Book of Estimates, 4 H. doc., 62nd cong., 2nd sess., p. 389 33
Book of Estimates, 5 H. doc., 62nd cong., 3rd sess., pp. 596 to 603 32
R. S. 2733 ..... 7, 15, 16
R. S. 2737 ..... 8, 16
R. S. 3687 ..... 31, 33
U. S. Compiled Statutes 1913, s. 5327 10

Supreme Court of the United States

OCTOBER TERM, 1917.

JAMES H. COCHNOWER, Appellant, vs. THE UNITED STATES.	No. 333.

APPELLANT'S BRIEF.

Statement of the Case.

I.

The above case comes to this court on appeal from the Court of Claims, and it is reported in 51 C. Cls. 461. The case is, primarily, one of statutory construction. It is based upon appellant's claim that he was, and is entitled to an additional sum of Two ($2.00) dollars per diem over and above the per diem salary paid him for his services as an inspector of customs in the port of New York from July 1st 1910, to and including June 30th, 1915 (R. 3). Appellant was paid at the rate of Four ($4.00) dollars per diem during the aforesaid period and he claims that he was entitled to Six ($6.00) dollars per diem for the same period (R. 3).

II.

Appellant is a citizen of the United States and a resident of the State of New York (R. 5). He was appointed night inspector in the customs service at Two and 50/100 ($2.50) dollars per diem on June 10th, 1879. He was appointed day inspector at Four ($4.00) dollars per diem September 23rd, 1883. This latter position was abolished on February 28th, 1901, and appellant was detailed as laborer at Two and 50/100 ($2.50) dollars per diem on September 10th, 1902. He was appointed storekeeper at Fourteen hundred ($1400) dollars per annum on July 13th, 1903. He was again appointed day inspector at Five ($5.00) dollars per diem on July 13th, 1908, and received said rate of pay until July 1st, 1910. All of the foregoing positions were under the customs service of the United States at the port of New York (R. 5).

III.

In June, 1910, the collector of the port of New York recommended to the Secretary of the Treasury a classification of the inspectors of customs at that port which provided for three rates of pay for said inspectors, viz, Four ($4.00) dollars, Five ($5.00) dollars and Six ($6.00) dollars per diem. The collector of customs appointed a committee to carry out such classifications, and, as a result thereof, appellant, who was then receiving Five ($5.00) dollars per diem was reduced to Four ($4.00) dollars per diem, such classification and reduction having the approval of the Secretary of the Treasury (R. 5, 6). Appellant knew nothing of his proposed reduction until after he had taken the oath of office for the

lower rate of pay, but immediately upon being notified that he had been reduced in pay, protested (R. 6).

IV.

Prior to 1902, all of the inspectors at the port of New York received Four ($4.00) dollars per diem. Pursuant to the provisions of the Act of December 16th, 1902, c. 2, (32 Stats. 753), all of the inspectors at said port were increased to Five ($5.00) dollars per diem on January 5th, 1903, and continued to receive said per diem salary until October 1st, 1905. On said latter date all of the New York inspectors were reduced to Four ($4.00) dollars per diem but were restored to Five ($5.00) dollars per diem on the 8th day of January, 1906, effective January 1st, 1906, by the Secretary of the Treasury, he, having been advised that he could not make the aforesaid reduction. All of these New York inspectors continued to receive Five ($5.00) dollars per diem thereafter and until July 1st, 1910, when the attempted classification heretofore mentioned was adopted (R. 6).

By the Act of June 30th, 1906, c. 3912, (34 Stats. 636), some Thirty-one thousand ($31,000) dollars was appropriated by Congress to pay the New York inspectors the difference between the per diem of Four ($4.00) dollars paid them during the months of October, November and December, 1905, and their *"proper per diem salary of Five ($5.00) dollars in accordance with the Act of Congress approved December 16th, 1902" (supra).* The above appropriation was recommended by the Treasury Department. A similar bill, using also the language quoted above, was passed on March 4th, 1907, c. 2919, (34 Stats. 1373) (R. 7).

Appellant was continued as inspector at New York at the compensation of Four ($4.00) dollars per diem from and after July 1st, 1910.

This action was brought to recover additional compensation of Two ($2.00) dollars per diem from July 1st, 1910, to and including June 30, 1915 (R. 7).

VI.

The Record Below.

Petition was filed in the court below July 7th, 1914 (R. 1). By leave of court, an amended petition was filed on July 2nd, 1915 (R. 1). Traverse was filed April 13th, 1916 (R. 4). Case was argued on April 13th and 14th, 1916, and submitted on the latter date (R. 4). Findings of Fact, Conclusion of Law and Opinion of the Court were filed October 16th, 1916 (R. 4). Petition was dismissed on the same date (R. 11) the traverse being sustained. Application for appeal was made and allowed October 24th, 1916, (R. 12).

VII.

Errata.

At some places in the record, such as p. 1, it appears that the original petition was filed July 7th, 1914, when same should be July 6th, 1914. At p. 2 in the eleventh line from the top the word "from" should be "for." At p. 10, third paragraph, sixth line thereof should be "Act of 1909" instead of "Act of 1900." In the same paragraph eleventh line thereof should be "Section 2737 Revised Statutes" instead of "Section 2738 Revised Statutes."

Assignment of Errors.

The court below erred:

First: In dismissing the petition.

Second: In not rendering judgment for the petitioner in the sum of Thirty-six hundred fifty-two ($3652) dollars.

BRIEF OF ARGUMENT.

I.

Statutory rule for construction.

The primary rule of statutory construction is to search out and follow the true intent of Congress and to discover what the legislature had in mind in enacting same.

The various Acts of Congress bearing upon customs inspectors' salaries.

For the purpose of placing before the court the complete legislation affecting the salaries of inspectors of customs, appellant submits herewith all of such statutes in full in the order of enactment.

ACT OF JULY 31, 1789, C. 5, SECTION 29 (1 STATS. 45) ENTITLED

"AN ACT RELATIVE TO THE COMPENSATION AND DUTIES OF CERTAIN OFFICERS EMPLOYED IN THE COLLECTION OF IMPOST AND TONNAGE. (In part as follows):

To each inspector there shall be allowed for every day he shall be actually employed in

aid of the customs, a sum *not exceeding* one dollar and twenty-five cents, etc." (Italics ours.)

ACT OF MARCH 3, 1797, C. 9, SECTION 3 (1 STATS. 503) ENTITLED

"AN ACT TO REGULATE THE COLLECTION OF THE DUTIES IMPOSED BY LAW ON THE TONNAGE OF SHIPS OR VESSELS AND ON GOODS, WARES AND MERCHANDISE IMPORTED INTO THE UNITED STATES. In part as follows:

That from and after the last day of March, in the present year, *in lieu of the sum heretofore established by law*, there shall be paid to each inspector, for every day he shall be employed in aid of the Customs, a sum *not exceeding* two dollars; etc." (Italics ours.)

ACT OF MARCH 2, 1799, C. 23, SECTION 2, (1, STATS. 707) ENTITLED

"AN ACT TO *ESTABLISH* THE COMPENSATION OF THE OFFICERS EMPLOYED IN THE COLLECTION OF THE DUTIES ON IMPOSTS AND TONNAGE, AND FOR OTHER PURPOSES. (Italics ours.) In part as follows:

'To each inspector there shall be allowed for every day he shall be actually employed in aid of the Customs, a sum *not exceeding* two dollars, etc." (Italics ours.)

ACT OF APRIL 26, 1816, C. 95, (3 STATS. 306) ENTITLED

"AN ACT TO *INCREASE THE COMPENSATION NOW ALLOWED BY LAW TO* INSPECTORS, MEASURERS, WEIGHERS AND GAUGERS EMPLOYED IN THE COLLECTION OF THE CUSTOMS. (Italics ours.) In part as follows:

'That an addition of *fifty (50%) per cent upon the sums allowed* as compensation to inspectors, or persons acting as occasional inspectors, employed in aid of the customs, and to the measurers, weighers or gaugers, by the act, entitled * * * be, and the same is hereby allowed, etc." (Italics ours.)

REVISED STATUTES, SECTION 2733

"Each inspector shall receive for every day he shall actually be employed in aid of the customs, three dollars; and for every other person that the collector may find it necessary and expedient to employ as occasional inspector, or in any other way in aid of the revenue, a like sum, while actually so employed, not exceeding three dollars for every day so employed."

Section 2733, Revised Statutes is based upon the Acts of 1799 and 1816 (*supra*).

ACT OF APRIL 29, 1864, C. 71, (13 STATS. 61) ENTITLED

"AN ACT TO *INCREASE THE COMPENSATION* OF INSPECTORS OF CUSTOMS IN *CERTAIN* PORTS." (Italics ours.)

'That the Secretary of the Treasury be, and he hereby is, authorized to increase the compensation of inspectors of customs in such ports as he *may think it advisable* so to do, and may designate, by adding to the present compensation of said officers a sum *not exceeding* one dollar per day. But the increase hereby authorized shall not extend beyond July 1st, 1865." (Italics ours.)

ACT OF MARCH 2, 1865, C. 73, SECTION 5, (13 STATS. 460) as follows:

"And be it further enacted, that the provisions of the act approved April 29, 1864, '*in-*

creasing the compensation of inspectors of customs in certain ports,' be extended to July 1st, 1866." (Italics ours.)

ACT OF JULY 23, 1866, C. 208, SECTION 9, (14 STATS. 208) as follows:

"And be it further enacted, That the provisions of the act approved April 29, 1864, *'increasing the compensation of inspectors of customs in certain ports'* is hereby continued in force." (Italics ours.)

REVISED STATUTES, SECTION 2737, as follows:

"The Secretary of the Treasury may increase the compensation of inspectors of customs in *such ports as he may think it advisable* so to do, and may designate, by adding to the present compensation of such officers, a sum *not exceeding* one dollar per day." (Italics ours.)

This Section 2737 of the Revised Statutes is based upon the Acts of 1864 and 1866 (*supra*).

ACT OF MARCH 3, 1881, C. 132, (21 STATS. 429), THE DEFICIENCIES ACT. In part as follows:

"For expenses of collecting the revenue from customs for 1878 and prior years, to pay claim numbered 81703, three dollars and fifty-four cents. Provided, that hereafter the Secretary of the Treasury *may appoint* inspectors of customs at a compensation less than three dollars per day, when, in his judgment, the public service will permit." (Italics ours.)

ACT OF DECEMBER 16, 1902, C. 2, (32 STATS. 753) Entitled

"AN ACT REGULATING THE DUTIES AND *FIXING THE COMPENSATION* OF THE CUSTOMS INSPECTORS AT THE *PORT OF NEW YORK.*" (Italics ours.)

"That the Secretary of the Treasury is hereby authorized to increase the compensation of inspectors of customs at the port of New York, as he *may think advisable and proper,* by adding to their *present* compensation a sum *not exceeding* one dollar per day, which additional compensation shall be for work now performed by them at unusual hours, for which no compensation is now allowed, and shall include work performed by said inspectors at night in examining passengers' baggage, and also as reimbursement for expenses incurred by them for meals and transportation while in the discharge or performance of their official duties." (Italics ours.)

ACT OF JUNE 30, 1906, C. 3912, (34 STATS. 636), DEFICIENCIES APPROPRIATION ACT. In part as follows:

"To pay the inspectors of customs of the *port of New York* the difference between the per diem salary of four dollars paid them during the months of October, November and December, 1905, and their *proper per diem salary for the same period (five dollars per diem) in accordance with the Act of Congress approved December 16, 1902,* thirty-one thousand dollars, or so much thereof as may be necessary." (Italics ours.)

ACT OF MARCH 4, 1907, C. 2919 (34 STATS. 1373) DEFICIENCIES APPROPRIATION ACT. In part as follows:

"To enable the Secretary of the Treasury to pay to certain inspectors of customs of the *port of New York* the difference between the per diem salary of four dollars paid them during the months of October, November and December, 1905, and their *proper per diem salary of five dollars* for the same period, nine hundred forty dollars." (Italics ours.)

ACT OF MARCH 4, 1909, C. 314, SECTION 2, (35 STATS. 1065) Entitled

"AN ACT *FIXING* THE COMPENSATION OF CERTAIN OFFICIALS IN THE CUSTOMS SERVICE, AND FOR OTHER PURPOSES." (Italics ours.)

"That the Secretary of the Treasury be, and he is hereby authorized to increase and fix the compensation of inspectors of customs, *as he may think advisable, not to exceed* in any case the rate of six dollars per diem, and in all cases where the maximum compensation is paid no allowance shall be made for meals or other expenses incurred by inspectors when required to work at unusual hours." (Italics ours.)

In addition to the foregoing statutes, there will come up for consideration the Act of August 24, 1912, c. 355, (37 Stats. 434) and the Executive order of March 3, 1913, issued pursuant thereto, (U. S. Comp. Stats., 1913, sect. 5327). That part of the aforesaid act applicable to the case at bar is herewith set forth:

"Section thirty-six hundred and eighty-seven of the Revised Statutes of the United States is repealed to take effect from and after June thirtieth, nineteen hundred and thirteen.

"The President is authorized to reorganize the customs service and cause estimates to be submitted therefor on account of the fiscal year nineteen hundred and fourteen bringing the total cost of said service for said fiscal year within a sum not exceeding $10,150,000 instead of $10,500,000, the amount authorized to be expended therefor on account of the current fiscal year nineteen hundred and twelve; in making such reorganization and reduction in expenses he is authorized to abolish or consolidate collection districts, ports, and subports of entry and delivery, to discontinue needless offices and employments, *to reduce excessive rates of compensation below amounts fixed by law or Executive order,* and to do all such other and further things that in his judgment may be necessary to make such organization

> effective and within the limit of cost herein fixed; such reorganization shall be communicated to Congress at its next regular session and shall constitute for the fiscal year nineteen hundred and fourteen and until otherwise provided by Congress the permanent organization of the customs service." (Italics ours.)

There is almost complete harmony in the reported cases on the above rule, and it would seem to be unnecessary to cite cases in support thereof. In arriving at the legislative intent certain well known rules of construction have been laid down from time to time. In a long line of decisions may be found the following cases:

> *U. S. vs. Jackson*, 143 Fed. 782.
> *Interstate Drainage & Investment Co. vs Board of Com.*, 158 Fed. 270.
> *Wabash R. R. Co. vs. Pearce*, 192 U. S. 179.

In the latter case, at p. 186, Mr. Justice Brewer announced the rule, as follows:

> "In order to fully understand the force and scope of any statute, we must have regard to the conditions and circumstances for which the legislation was intended, and under which it is to become operative. We are not narrowly to read the letter and ignore the state of affairs to which that legislation was intended and is applicable."

Applying the above rule to the case at bar the court will approach the Act of March 4, 1909 (*supra*) by an examination of the conditions, circumstances and state of affairs which said legislation was intended to remedy. The court will take judicial notice of the fact that Congress had, from time to time, passed laws authorizing increases of pay for inspectors of customs, and that such increases were provided for

the purpose of meeting the increasing cost of living. But if we are in error in assuming that this is a matter of which the court will take judicial notice, then reference to the report of the House Committee, submitted at the time of the passage of the aforesaid act, a copy of which is set forth in full in the appendix to this argument, will show that it is expressly stated that the increases provided in said bill were authorized for two purposes, namely, first, to meet the increased cost of living; second, to reimburse inspectors at ports of extensive area for disbursements incurred by them for meals and carfare because their duties compelled them to travel considerable distances from their homes.

Such a reference to the Committee's report is however, unnecessary because the plain context of the act in question indicates that an increase in salary was intended, and resort therefore is not needed to other rules of statutory construction. The Act of 1909 is absolutely clear and unambiguous on the question that an increase of pay was intended. There is no language in this statute susceptible of being construed as granting any power other than "to increase and fix." Not even by implication can there be found any authority to reduce the compensation of any officials provided for in said act. The act, however, is not clear as to what ports the increases of pay should obtain in, and for this reason, as we will hereafter set forth in more detail, resort must be had to other well known rules of statutory construction in order to arrive at the true intent of the legislative mind on this point.

In the case of *U. S. vs. Jackson (supra)*, Hawley, J., says, p. 786:

> "Courts should search out and follow the true intent of Congress and adopt 'the sense of the words which harmonizes best with the

> context, and promotes in the fullest manner the apparent policy and object of the legislation (cases cited)' "

This case collates the authorities on statutory construction, and the rules mentioned therein are those laid down by this court in innumerable cases.

Summing up the foregoing we approach the Act of 1909, having it clear in mind that Congress intended an increase of pay for certain classes of customs officials throughout the United States, but with some doubt as to the ports in which such increases should be allowed.

II.

Statutes in pari materia to be construed together.

When Congress has legislated upon a given subject from time to time, all of such acts are to be construed together as though they were one law.

The rule announced above was laid down at an early date by this court and has been consistently followed.

> *Alexander vs. Alexandria,* 5 Cranch 1.
> *U. S. vs. Freeman,* 3 How. 556.
> *Converse vs. U. S.,* 21 How. 463.
> *Mosle et al. vs. Bidwell,* 130 Fed. 334.
> *Lavin vs. Board of Com.,* 151 Ill. App. 236.

In the Alexander case, at p. 7, Mr. Chief Justice Marshall announced the rule as follows:

> "That acts in *pari materia* are to be construed together as forming one act. If, in a subsequent clause of the same act, provisions

> are introduced, which show the sense in which the legislature employed doubtful phrases previously used, that sense is to be adopted in construing those phrases. Consequently, if a subsequent act on the same subject affords complete demonstration of the legislative sense of its own language, the rule which has been stated, requiring that the subsequent shall be incorporated into the foregoing act, is a direction to courts in expounding the provisions of the law."

In the Freeman case the Court held, at p. 564, that it is an established rule of law "that all acts *in pari materia* are to be taken together as if they were one law."

To the same effect is the language of the Chief Justice in the Converse case, at 467. The learned Chief Justice in this latter case emphasized the necessity of this rule in the following language, at p. 467:

> "The object and policy of this whole legislation, when taken together, will be made evident by looking to the state of the law before and at the time the different laws were passed, and the defects which then existed and which they were intended to remedy."

Applying this rule to the case at bar, and reverting to the first legislation upon the subject in 1789, which was one of the early acts of the first Congress of the United States, we find that Congress provided for inspectors' salaries on a per diem basis, in the following language:

> "not exceeding one dollar and twenty-five cents per diem."

This language alone would not seem to indicate that Congress intended to fix inspectors' salaries at One and 25/100 ($1.25) dollars *per diem*. However, in the Act of 1797 we learn what meaning the legisla-

ture attached to the foregoing language because we find in this later act this language:

> "in lieu of the sum heretofore established by law."

It is apparent, therefore, that Congress intended the inspectors of customs to receive the maximum amount named in the Act of 1787 and as a matter of fact, they did receive said maximum. This Act of 1797 used similar language in authorizing the increase to Two ($2.00) dollars per diem. The Congress having construed this language, "not exceeding" we are in a position of not having to guess as to whether Congress intended the inspectors to receive Two ($2.00) dollars per diem under the Act of 1797.

The Act of 1799 constitutes the organic law of the customs service, and we find that the portion of said act relating to inspectors has for its title "An Act to *establish* the compensation of the officers employed in the collection of the duties on imposts and tonnage." (Italics ours.) Again we find that Congress used the language "not exceeding" Two ($2.00) dollars.

We now come to an examination of the Act of 1816 which is entitled "An Act to increase the compensation *now allowed by law* to Inspectors, etc." (Italics ours.) This act authorizes an increase of 50% to the inspectors. It is therefore manifest that the legislature regarded the Act of 1799 as having fixed the pay of inspectors at Two ($2.00) dollars per diem. This view becomes conclusive when we have reference to Section 2733 of the Revised Statutes, which, without question, fixes the pay of Inspectors at Three ($3.00) dollars and refers to the Acts of 1816 and 1799 as the authority therefor.

We now proceed to a consideration of the Act of 1864 which is entitled "An Act to *increase the compen-*

sation of Inspectors of Customs in *certain ports.*" (Italics ours.) Here we find that Congress authorized an additional One ($1.00) dollar per diem to be added to the compensation of the inspectors in certain ports to be designated by the Secretary of the Treasury. Congress again used the language "not exceeding" and it is apparent that the Secretary of the Treasury construed the said language "not exceeding" in the same way as Congress had previously so construed it, for he immediately selected certain of the larger ports and increased the compensation of all the inspectors therein to Four ($4.00) dollars per diem. This Act of 1864 only authorized such increase for one year, however, and so we find that in 1865, authority was given by Congress to extend said increases for an additional year, namely: to July 1st, 1866. In 1866 Congress extended said increases in the ports designated by the Secretary of the Treasury without limit and referred to the Act of 1864 as the act "*increasing the compensation* of inspectors of customs in *certain ports.*" (Italics ours.)

In 1874 a revision of the statutes was begun by Congress, and we find the Acts of 1799 and 1816 constituting the basis of Section 2733, Revised Statutes, and the Acts of 1864 and 1866 as the basis for Revised Statutes, Section 2737. At the time of the revision of the statutes, it is therefore apparent that the inspectors of customs in the ports designated by the Secretary of the Treasury under the Act of 1864 were receiving salaries of Four ($4.00) dollars per diem, and that said salaries had the legislative sanction and had become fixed by the Acts of 1864 and 1866. In all of the ports not so designated by the Secretary of the Treasury, salaries of Three ($3.00) dollars per diem were paid pursuant to the Act of 1816.

In 1881 Congress, in the General Deficiencies Act gave the Secretary of the Treasury the power to appoint inspectors at less than Three ($3.00) dollars per diem, when, in his judgment the public service would permit. It appears that prior to the passage of this act certain inspectors of customs in certain small ports throughout the United States had been appointed at Two and 50/100 ($2.50) dollars per diem, and that they had filed claims for the additional fifty cents per diem pursuant to the terms of Section 2733, Revised Statutes. One of these claims came on to be heard before the Court of Claims;

Adams vs. the U. S., 20 C. Cls. 115

and it was there held that the claimant was entitled to the additional fifty cents per diem from the date of his appointment in 1875. Manifestly, this Act of 1881 did not and could not have affected the salaries of those inspectors in the ports designated by the Secretary of the Treasury pursuant to the Act of 1864. All the Inspectors in these designated ports were then receiving, and continued to receive, their statutory salary of Four ($4.00) dollars per diem. The purpose of the Act of 1881 is quite plain; it was to allow the Secretary of the Treasury to appoint Inspectors in certain small ports where the duties were not very onerous and where the cost of living was very low, at a rate below the amount fixed in Section 2733, Revised Statutes.

We now reach for consideration the first special statute passed by Congress upon this subject, all of the foregoing enactments being general in their nature, and referring to inspectors at large. The special act was that of August 16, 1902. Here we find the title of the act as follows: "An Act Regulating the duties and *fixing* the compensation of the cus-

toms inspectors at the port of New York." (Italics ours.) Here again Congress used the language "not exceeding" and we submit that the true meaning of such language as used by Congress can not now be open to doubt. Once again the Secretary of the Treasury construed this language as intending a definite increase to the maximum sum stated (R. 6). For immediately upon the passage of this act all of the inspectors in the port of New York were increased to Five ($5.00) dollars per diem. They continued to receive this salary until the first day of October, 1905, when they were all reduced to Four ($4.00) dollars per diem. Upon being advised that he could not make this reduction, (R. 6) the Secretary of the Treasury restored all of these inspectors at New York to Five ($5.00) dollars per diem on the 8th day of January, 1906, said restoration dating from January 1st, 1906. It thus appears that the Secretary of the Treasury ascertained that when he increased the inspectors in New York to Five ($5.00) dollars per diem on January 5th, 1903, he had then and there fixed their salary at said rate and that he was without authority to reduce it. If there could be any doubt that such was the case reference to the Act of June 30, 1906, completely removes the doubt. Inasmuch as this Act of 1906 will be referred to in more detail hereafter, no further mention will now be made at this point as to the effect thereof. After their restoration to Five ($5.00) dollars on January 1st, 1906, and after receiving from Congress the extra One ($1.00) dollar a day that was taken from them during the three months of October, November and December, 1905, by the aforesaid Act of 1906, all of the inspectors at New York continued to receive the said Five ($5.00) dollars per diem until July 1st, 1910.

In the meantime Congress passed the Act of 1909 authorizing the increase to Six ($6.00) dollars per diem. The said act is entitled "An Act *fixing* the compensation of certain officials in the customs service and for other purposes." (Italics ours.) Once again we find the legislature using the language "not to exceed" and all that is necessary to do is to apply the long continued legislative and executive interpretation of such language to arrive at the true meaning thereof.

Considering all of the foregoing acts together it would appear that under no reasonable theory could the Act of 1909 be construed so as to give the Secretary of the Treasury any power "to readjust or change" the compensation of the officers named therein as stated by the learned court below (R. 11). The power that was conferred plainly was to "increase and fix" and nothing else. He was empowered first to increase and then to fix the salaries. If the word "fix" has any meaning at all it must be held that the legislature intended that the salaries when once increased should be then regarded as "fixed." In other words, Congress intended a limitation upon the power of the Secretary of the Treasury; having once made the authorized increases his power then ceased, and the salaries thus increased had all the force and effect of original statutory action. The Secretary of the Treasury was *functus officio*, having complied with the legislative mandate. The language of this statute can not under any theory be construed as vesting a power to decrease salaries. The clear and unequivocal language of this part of the act argues to the contrary and the conditions sought to be remedied by the legislative body bears out the plain context of the act.

We thus have a long series of congressional enact-

ments continuing over a period of approximately one hundred and twenty years wherein similar phrases and language were constantly used, repeated and construed by the legislature, and it may be said in this connection that the administrative officials during this entire period, followed the legislative interpretation of its own acts. For the first time in all this period we find an administrative official in 1910, attaching to these repeatedly used phrases a different meaning from that hitherto attached to them.

Never before 1910 had any administrative official attempted to discriminate between inspectors' salaries in the same port. The office of inspector of customs was created by statute, the duties prescribed by statute, and the compensation fixed by statute, so we submit. In the absence of the clearest language authorizing the discrimination practiced in 1910, we contend that no such discrimination will be implied or read into the statute. The only discrimination that the history of this legislation shows to have been authorized by the legislature was discrimination in rates between certain ports. Obviously there was sound reason for this for the inspectors in the larger ports have much more onerous duties to perform, much greater responsibilities and have to meet a much higher cost of living than in the smaller ports. This practice is well recognized in all branches of the executive service, for invariably Congress authorizes higher salaries for the larger cities than it does for the smaller ones. This applies to all the officers of the customs service, collectors, naval officers, appraisers, surveyors and their respective deputies. We submit most earnestly that there is nothing in the Act of 1909, nor in the preceding acts, to warrant a discrimination between inspectors at the same port. These officers are not mere clerks. They are stat-

utory officers and have most unusual powers conferred upon them by statute, namely: the power of search, seizure and arrest without warrant. The office was created by the first Congress of the United States and has been consistently maintained, and the functions thereof enlarged. It is clear therefore, that the administrative power should not attempt to deal with these officers as he would deal with clerks over whom he is given, by statute, practically unlimited authority and direction for the reason that clerks' duties are such that they cannot be classified or prescribed by legislative mandate with any degree of certainty.

III.

An executive officer may not change a salary fixed by statute.

It is well settled that when Congress has fixed the salary of a public officer by statute, that an executive officer may not increase or decrease same.

The rule above announced has been conclusively settled by this Court.

Glavey vs. the U. S., 182 U. S. 595.
U. S. vs. Andrews, 240 U. S. 90.

Appellant insists that the statutory salary was fixed in the port of New York by the Acts of 1902 and 1906 at Five ($5.00) dollars per diem for inspectors of customs. Therefore, without considering the effect of the Act of 1909 at all, it is clear that appellant was reduced below his statutory salary when he was demoted to Four ($4.00) dollars per diem on July 1st, 1910. Giving effect to the intention of Congress,

as appears in the said Act of 1909, appellant should have been increased to Six ($6.00) dollars per diem on July 1st, 1910, instead of being decreased.

IV.

No theory of waiver or estoppel bars appellant's rights.

The salary of a statutory office attaches thereto, as an incident of the office, and no action taken by the appointing power, even though assented to by the appointee can serve to deprive a duly appointed official of the statutory salary.

Where Congress has fixed the salary of an office, and where there is a duly appointed incumbent thereof, the appointing power cannot evade the salary provisions of the statute by requiring or compelling the appointee to accept a lower salary than the statute provides, and if the appointee accepts the lower salary and signs receipts in full therefor without protest, such action does not prevent him from later asserting his right to the difference between the salary of the office and the amount paid him.

Glavey vs. the U. S. (*supra*).

In the case at bar appellant duly protested at the time of his demotion on July 1st, 1910. (R. 6) His protest, however, was not necessary to conserve his right to assert subsequently his claim to his lawful salary.

V.

The Court may refer to the history of the passage of an act through Congress to arrive at its true meaning.

In the case of doubtful or ambiguous statutes, or parts thereof, the court may properly refer to the history of the passage of the act through Congress, the committee reports and the debates thereupon in order to ascertain the intent of the legislature in enacting same.

While it is true that it has been held that the courts will not examine the history of the passage of an act through Congress where no ambiguity exists in the context thereof, yet the cases uniformly hold that where a statute is doubtful, in whole or in part, reference may, and should be had to the record of the passage of the act through the legislative body, the debates and the committee reports thereupon. The following cases emphasize this rule:

Mosle et al. vs. Bidwell, 130 Fed. 334.
Shallus vs. U. S., 162 Fed. 653.
Binns vs. U. S., 194 U. S. 486.
Standard Oil vs. U. S., 221 U. S. 1.
Swigart vs. Baker, 229 U. S. 187.
Lewis Pub. Co. vs. Morgan, id. 288.
St. Louis & Iron Mt. Ry. vs. Craft, 237 U. S. 648.

Due to the fact that Congress had passed a law in 1864 authorizing increases for inspectors in certain ports to be designated by the Secretary of the Treasury who named New York as one of said ports, and it had again in 1902 authorized a further increase

by special statute for the inspectors in said port of New York, it must be conceded that the Act of 1909 is not clear with reference to the ports where the increases therein provided should obtain in. Nor is the Act of 1909 clear as to whether the words "case" and "cases," as used therein, were intended to apply to ports or to individual inspectors. If the Act of 1864, which was the last general legislation upon the subject, throws any light upon the situation, the succeeding general Act of 1909 left the designation of the ports where increases were intended, to the Secretary of the Treasury. In order to resolve these patent ambiguities we will now proceed to an examination of the history of the passage of this Act of 1909 through Congress. On January 16, 1908, Senator Hopkins, of Illinois, introduced, S. 4066,

"A BILL

AUTHORIZING THE SECRETARY OF THE TREASURY TO INCREASE THE COMPENSATION OF INSPECTORS OF CUSTOMS.

"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That the Secretary of the Treasury be, and he is hereby, authorized to increase the maximum compensation of inspectors of customs not to exceed six dollars per diem, at the ports of New York, Chicago, Boston and Philadelphia."

This bill was referred to the Committee on Commerce on said date (p. 770 Cong. Record, 60th Congress, First Session). On February 6, 1908, Senator Hopkins of said Committee, reported the bill with an amendment, striking out the words "and Philadelphia" and substituting in lieu thereof "Philadelphia and San Francisco and such other ports as he may designate,"

and submitted a report (S. 180) a copy of which is printed in full in the Appendix to this argument, (p. 1662, Cong. Record, 60th Congress, First Session). On February 11, 1908, S. 4066 was considered by the Committee of the Whole. The amendment above was agreed to and the bill was passed as amended, (p. 1812, Cong. Record, 60th Congress, First Session). On February 12, 1908, S. 4066 as passed, was referred to the House of Representatives and sent from the Speaker's Desk to the Ways and Means Committee, (p. 1954, Cong. Record, 60th Cong., First Session). On April 18th, 1908, Representative Dalzell, a member of the Ways and Means Committee in the House, introduced H. R. 21,003 in lieu of a number of bills previously introduced, and the same was referred to the Ways and Means Committee, (p. 4948, Cong. Record, 60th Congress, First Session). On the same day, Mr. Dalzell reported H. R. 21,003 without amendment and submitted a report (H. 1470), a copy of which is printed in full in the Appendix to this argument. Both the bill and report were referred to the Committee of the Whole House on the State of the Union, (p. 4947, Cong. Record, 60th Congress, First Session). On April 25, 1908, H. R. 21,003 with two amendments, was debated in the House and passed, (ps. 5241-5245, Cong. Record, 60th Congress, First Session). Section 2 of this bill provided for a maximum compensation of only Five ($5.00) dollars for inspectors of customs. On April 27, 1908, the House bill, as passed, was referred to the Senate, read twice, and referred to the Finance Committee, (p. 5294, Cong. Record, 60th Congress, First Session). On May 15, 1908, Senator Aldrich, from the Committee on Finance, reported H. R. 21,003 with an amendment. The amendment struck out all the provisions of the House bill and substituted in

lieu thereof, S. 4066 as previously passed, (p. 6302, Cong. Record, 60th Congress, First Session). On May 28, 1908, H. R. 21,003 as amended by the Committee on Finance, was called up in the Senate by Senator Aldrich by unanimous consent. The bill as amended, as heretofore stated, provided a maximum compensation of Six ($6.00) dollars per diem for the inspectors at New York, Chicago, Boston, Philadelphia and San Francisco, and *such other ports as the Secretary of the Treasury might designate.* (Italics ours.) Senator Aldrich then offered from the floor, a further amendment, adding as Section 2, a provision fixing the salary of the Treasurer of the United States at Eight Thousand ($8,000.) dollars per annum. The amendments were agreed to and the bill passed without debate, (p. 7124, Cong. Record, 60th Congress, First Session). On May 29, 1908, Representative Dalzell moved to disagree to the Senate amendments and asked for a conference. Upon an affirmative vote, the Speaker appointed as conferees for the House Messrs. Payne, Dalzell and Underwood, (p. 7214, Cong. Record, 60th Congress, First Session).

On May 30, 1908, the action of the House of Representatives disagreeing to the amendments of the Senate and requesting a conference on the disagreeing votes of the two Houses, was laid before the Senate, and upon motion of Senator Aldrich, the latter body insisted upon its amendments and agreed to the conference as asked for by the House. The Vice President thereupon appointed Senators Aldrich, Hale and Teller as the conferees on the part of the Senate. The matter remained in conference until March 2nd, 1909.

The conference report was called up in both Houses on the date last mentioned above, and it appeared

that the Senate had prevailed with its intention to increase the maximum compensation of inspectors to Six ($6.00) dollars per diem, but omitted to designate any ports whatever, leaving the whole question of the selection thereof in the hands of the Secretary of the Treasury. The Senate yielded to the House with regard to the other provisions of the bill. The language of the whole act was changed somewhat in conference so as to harmonize the language used in the various sections thereof. The conference report was approved in the Senate on motion of Senator Aldrich on March 2nd, 1909 (p. 3621, Cong. Record, 60th Congress, Second Session). On the same day in the House, a message came from the Senate to the effect that the latter body had agreed to the report of the Committee on Conference on the disagreeing votes of the two Houses on the amendments of the Senate to H. R. 21.003 (p. 3679, Cong. Record, 60th Congress, Second Session). The conference report was called up in the House by Representative Payne on the same day (p. 3695, Cong. Record, 60th Congress, Second Session). The conference report was agreed to by the House after debate, (p. 3696, Cong. Record, 60th Congress, Second Session). The House receded from the disagreement to the Senate amendment concerning inspectors and concurred with an amendment restoring the other sections of the House bill. The House also agreed to the Senate amendment fixing the salary of the United States Treasurer. The enrolled bill was signed by the Vice-President and the Speaker on March 3, 1909, and by the President on March 4, 1909.

The above record of the passage of this act through Congress indicates clearly that the words "case" and "cases" as used therein are to be read as "port" and "ports," respectively. It is equally clear that Congress intended to increase the pay for certain *classes*

of customs officials throughout the country, leaving to the Secretary of the Treasury the power to designate what ports said increases should obtain in. This view is strengthened by an examination of the House report. This report on pages 50, 51 states that "in order to more nearly *equalize* salaries according to *responsibilities* and *amount of labor* of the officials, the Secretary of the Treasury should have authority to increase the salaries of *certain classes* of officials. (Italics ours.) Here it is apparent that Congress recognized that in some of the ports throughout the country the responsibilities and amount of labor required were greater than in others, and the report specifically refers to *certain classes* of officials, showing an intent to provide increases for a class and not for individuals. It is true that the House bill only provided a salary of Five ($5.00) dollars for inspectors, but this was changed when the House agreed to the Senate amendment, so that the Committee language referred to above applies with equal force to the Six ($6.00) dollar provision.

Again in the House report (p. 52) the Committee states that the "increase is urged for the purpose of compensating inspectors at *ports of extensive area* for expenditures of meals, carfare, etc., which it is claimed is necessary because their duties send them so far away from their homes, etc." (Italics ours.) Here again we find the committee referring to "ports," and appellant submits that the fair inference to be drawn from this language is that the intention was to provide for increases in "certain ports" to "certain classes of customs officials." The intent of the Committee is further clearly evidenced that increases were intended to the maximum amount stated by reference to the Committee's statement with regard to the increase authorized in the pay of the San Francisco

weighers. At page 53 of the Committee says with reference to Section 5,

> "The effect of this section will be to authorize the increase of the pay of San Francisco weighers from Two Thousand ($2000) dollars to Twenty-Five Hundred ($2500) dollars."

This increase provided amounts to twenty-five (25%) per cent of the then existing salary, and it is evident that the Committee intended that the San Francisco weighers should have the full amount of the increase authorized. It is also evident that the Committee intended to place the San Francisco weighers on the same basis as the New York weighers and we think that the whole report clearly indicates an intent to equalize the pay in the various other large ports throughout the country with the pay in the port of New York. We are strengthened in this view by the Committee's reference to Assistant Weighers. (p. 54.) The Committee states that the bill proposed an increase of pay in ports other than New York where like conditions prevailed to the pay then authorized for the New York assistant weighers.

Even the minority report shows that it was well recognized that definite increases of pay were being provided for certain positions in certain ports. The minority report opposed the increases until, as was stated therein, a reorganization and readjustment of customs service on a basis similar to that of the Internal Revenue service could be had so that the cost of collection would be somewhat near the same figure in the two services. It is clear that the majority report, which was adopted by Congress, did not authorize any such reorganization and readjustment, as urged by the minority, and as was subsequently attempted by the Secretary of the Treasury under his reorganization plan of July 1st, 1910, and which the

learned Court below holds was authorized by the said Act of March 4, 1909.

The debate in the House of Representatives when this bill was up for discussion (pp. 5241-5245, Cong. Rec., 60th Cong. 1st Sess. and p. 3696, Cong. Rec., 60th Cong., 2nd Sess.) indicates that careful consideration was given to the increased cost of living and that the increases provided therein were authorized and directed with full knowledge as to the administrative construction of previous statutes on the same subject matter. Appellant does not contend that these debates are binding on the courts, but does submit that they throw considerable light upon the conditions existing at that time, conditions which the legislation sought to remedy, and therefore, are entitled to some weight. It may be well at this point to refer briefly to the attempted reorganization at the port of New York on July 1st, 1910, when appellant was reduced to four dollars per diem. Some 52 inspectors were promoted to six dollars per diem but 52 others were demoted to four dollars per diem (R. 6). Necessarily, no increase in expenditures was caused thereby, for one dollar per diem was taken from one officer and given to another. This brought about a situation where two statutory officers, working side by side, performing similar duties and charged by law with similar responsibilities, were receiving six dollars and four dollars per diem respectively. Surely, it cannot be said that such a result was within the expressed or implied intent of the legislative mind.

During the debate in the House, the question was asked by Representative Mann of Representative Dalzell as to what would be the total cost of the bill under consideration, and the reply was approximately Three Hundred Thousand ($300,000) dollars (p. 5242, 60th Cong., 1st Sess.). It is therefore interest-

ing and instructive to examine briefly the authorized expenditures for collecting the revenue from customs for the fiscal years ending June 30th, 1909, and June 30, 1910. We submit herewith the following table:

Fiscal Year Ending June 30, 1909.

R. S. 3687, permanent annual appropriation	$5,500,000
Act of May 27, 1908, c. 200 (35 Stats. 328) Sundry Civil Bill	4,500,000
Moieties compensation	25,000
Detecting frauds	200,000
For the purchase of automatic scales	25,000
Act of March 4, 1909, c. 298 (35 Stats. 910) Deficiencies Act	500,000
Total	$10,750,000

Fiscal Year Ending June 30, 1910.

R. S. 3687 permanent annual appropriation	$5,500,000
Act of March 4, 1909, c. 299 (35 Stats. 968) Sundry Civil Act	5,000,000
Moieties compensation	25,000
Detecting frauds	200,000
Act of June 25, 1910, c. 385 (36 Stats. 781) Deficiencies Appropriation Act	$250,000
Total	$10,975,000

It thus appears that Congress appropriated some Two Hundred and Twenty-Five Thousand ($225,000) dollars more for the fiscal year 1910 than it did for the fiscal year 1909. Most of this increase is accounted for by the increase of the night inspectors

force in the port of New York by the addition thereto of some two hundred or more employees. The name of this force was changed to customs guards beginning June 1st, 1909. The estimates of the Secretary of the Treasury for the aforesaid fiscal years of 1909 and 1910 do not show in what manner or to what officers the increased expenditures authorized by the Act of March 4, 1909, were to be applied. There is no reference in the estimates of these two years as to the different classes of officers provided for in said estimates, nor as to the number of employees in each of the several classes. However, for the fiscal year ending June 30, 1914, (Book of Estimates, 5 House Doc., 62nd Congress, 3rd Session, pgs. 596 to 603), it will be noted that the Secretary gave the various classes, numbers and pay of the officials engaged in the collection of the revenue from customs, and on p. 597 will be found an estimate covering four hundred and seventy-nine customs guards, an office which did not exist prior to June 1st, 1909. It is true that these four hundred and seventy-nine customs guards were located in the various large ports throughout the United States, but more than three hundred of them were in the port of New York alone. Appellant's contention is, therefore, that sufficient money was appropriated by Congress in each fiscal year succeeding the year ending June 30, 1909, to effectuate the intent of Congress with regard to increasing the salaries of customs inspectors, as manifested in the Act of March 4, 1909. From the appropriations heretofore and hereafter set forth it is equally manifest that sufficient money was appropriated for the fiscal years following 1910, to carry out this intent of Congress.

We find from the estimate of the Secretary of the Treasury for the fiscal year ending June 30, 1911, Book of Estimates, 3 House Doc., 61st Congress,

2nd Session, p. 397, that the sum of Five Million ($5,000,000) dollars was requested under the authority of the Act of March 4, 1909, in addition to the lump sum appropriation of Five Million Five Hundred Thousand ($5,500,000) dollars, provided in R. S. 3687. For the fiscal year ending June 30, 1912, Book of Estimates, 3 House Doc., 61st Congress, 3rd Session, at p. 361, it will be found that the estimates are the same as for the previous fiscal year. The appropriation for the fiscal year 1912, however, greatly exceeded the estimates, being $11,150,000. See (R. S. 3687), (Act Mar. 4, 1911, c. 285 [36 Stats. 1393]; Act Aug. 26, 1912, c. 408 [37 Stats. 598]). Again for the fiscal year ending June 30, 1913, Book of Estimates, 4 House Doc. 62nd Congress, 2nd Session, at p. 389, we find the same estimates as for the two previous years and appropriations greatly in excess thereof, see (R. S. 3687); Act Aug. 24, 1912, c. 355, [37 Stats. 434]; Act Oct. 22, 1913, c. 32 [38 Stats. 211]; Act July 29, 1914, c. 215 [38 Stats. 565]).

Summing up appellant's contention with regard to these estimates and appropriations, it is submitted that so far as Congress knew, all of the authorized increases pursuant to the Act of March 4, 1909, had been carried into effect, and it is inferred therefrom that the legislative body adopted and ratified the construction of the administrative officials of the Act of 1909, in a manner similar to the construction by Congress in its Act of 1906 of the previous Act of 1902 relating to the port of New York. It would thus seem that Congress assumed that the officers provided for in the Act of 1909 were receiving the additional increase therein provided for the expenditures for collecting the revenue from customs increased in the succeeding fiscal year by an amount sufficient to carry into effect the intent of the act.

VI.

When Congress re-enacts a statute it adopts the administrative construction of the previous statute in pari materia.

When the legislature re-enacts a statute in substantially the same language as that used in a prior statute, it is presumed that the legislature adopts the administrative construction placed upon the previous statute, particularly if such construction is of long standing.

The rule above announced is, we think, a fair and reasonable one, since it must be presumed that the legislative body is familiar with the construction placed upon a previous statute by the administrative officials charged with the execution thereof.

U. S. vs. Falk, 204 U. S. 143.
Copper Queen Mining Co. vs. Arizona Board, 206 U. S. 474.
U. S. vs. Hermanos, 209 U. S. 337.
Komada vs. U. S., 215 U. S. 392.

In the Copper Queen case Mr. Justice Holmes interpreted the above rule (p. 479) in the following language:

> "When for a considerable time a statute notoriously has received a construction in practice from those whose duty it is to carry it out, and afterwards is re-enacted in the same words, it may be presumed that the construction is satisfactory to the legislature, unless plainly erroneous, since otherwise, naturally the words would have been changed."

From 1787 down to 1909, without a deviation, the administrative officials charged with the execution of

the various statutes relating to inspectors' salaries, all of which used the same or similar terms and language in providing for increases, had construed same to mean that the inspectors were to be increased to the maximum amount named in the respective statutes. Congress apparently was satisfied with this interpretation for it continued to appropriate over a period of one hundred and twenty years sufficient money each year to carry into effect this interpretation. We submit, therefore, that when Congress used the same language in the 1909 act it intended the same construction to be attached thereto as had been attached to the previous statutes bearing upon the same subject-matter.

VII.

The contemporaneous construction of a doubtful statute is entitled to great weight.

In cases of doubtful or ambiguous statutes the contemporaneous construction by those charged with the execution thereof is entitled to great weight and should not be disregarded or overturned except for cogent reasons.

Where a statute, or a series of statutes, has long received construction from those upon whom the law places the duty of carrying the same into execution, and where said statute, or statutes, are ambiguous in part or in whole, the courts have uniformly held that the practical interpretation thereof by the administrative officials is entitled to great weight.

U. S. vs. Johnston, 124 U. S. 236.
Fairbanks vs. U. S., 181 U. S. 283.
U. S. vs. Falk, (supra).
U. S. vs. Hermanos, (supra).
Komada vs. U. S., (supra).

We submit that the very first statute passed in 1789 concerning the pay of inspectors was ambiguous, and that the succeeding acts were equally so, if considered alone. The administrative construction of these various statutes never varied however, as we have heretofore stated, during a period of one hundred and twenty years, and we are confident that the court will give due weight to this practical interpretation by the administrative officials throughout this long period of time.

VIII.

Permissive language in a statute conferring rights on the public or third parties is deemed mandatory.

Where power is given to public officers in permissive language in acts conferring rights on the public or individuals, such language though permissive in form, is in fact mandatory.

It has been held that where permissive language is used in a statute empowering a public official to do some act for the public interests or for the benefit of a third person, the law requires that that act shall be done for the power is given not for the benefit of the public official but for the benefit of the public or of individuals. The power is placed with the depository to meet the demands of right and to effect-

uate the intent of the legislature. It is given as a remedy to those who are entitled to invoke its aid and in all such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but to impose a positive and absolute duty.

Supervisors vs. U. S., 4 Wall. 435.
Ralston vs. Crittendon, 13 Fed. 508.
Village of Kent vs. U. S., 51 C. C. A. 189.
Boswell vs. Coal Co., 217 Fed. 822.
Phelps vs. Hawley, 52 N. Y. 23.
People vs. Land Com., 207 N. Y. 42.

While it is true that some of the acts referring to inspectors' pay use the words "may think advisable" or "may think it advisable so to do," yet it is quite clear that Congress intended each time to increase the existing pay and that the permissive language used was only the legislature's way of diplomatically saying "must." Certain rights were conferred upon individuals by these various statutes, namely, upon inspectors of customs, and the reason for the continued use of this language was that every administrative official had construed such language in the way Congress intended. Increases for inspectors of customs had been effected on numerous occasions by using this directory language, and it must be presumed that the same construction was intended to be given to the same language when used in the last act, namely, that of 1909.

IX.

A subsequent general statute does not repeal a prior special statute.

The general rule is that a general statute subsequently passed does not repeal a prior special statute

unless it specifically so states. Repeals by implication are not favored.

Where Congress has legislated with respect to a given matter, that express legislation must control in the absence of subsequent legislation equally express, and the prior legislation is not overthrown by mere inference or implication to be found in the subsequent legislation.

Rosencrans vs. U. S., 165 U. S. 257.
Rodgers vs. U. S., 185 U. S. 83.
Mutual Life Ins. Co. vs. Hill, 193 U. S. 551.
Washington vs. Miller, 235 U. S. 422.
Washington Trust Co. vs. Dunaway, 169 Fed. 37.
In re Anderson, 214 Fed. 662.
Whipple vs. Christian, 80 N. Y. 523.
State vs. Capdeville, 140 La. 229.

The above rule was clearly laid down in the Rodgers case by Mr. Justice Brewer at p. 87 in the following language:

> "It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general—the terms of the general broad enough to include the matter provided for in the special—the fact that the one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special."

While it is true that the Act of 1909 carried a general repealing clause in Section 8, yet such repealer only applied and referred to those statutes that were manifestly inconsistent with the terms thereof. Surely it cannot be seriously argued that there is any inconsistency between the Acts of 1902, 1906 and 1909. The Act of 1902 provided an increase to Five ($5.00) dollars per day for the inspectors at New York alone. The Act of 1906 emphasized and made it clear that all of the inspectors at New York were intended to have the Five ($5.00) dollars per diem. The Act of 1909 intended a further increase for the inspectors at New York and for other ports to be designated by the Secretary of the Treasury to Six ($6.00) dollars per diem. In other words the later statute merely authorized a further increase over the then existing pay. If the special statute of 1902 was in hopeless conflict with the general statute of 1909, a different situation would be presented.

The court below held, (R. 11), that the Act of 1909 was intended to supersede all prior legislation upon the subject. We fail to grasp the reasoning upon which this opinion is predicated. Had there been language in the act that might fairly be construed as authorizing a complete readjustment of salaries for the officials therein named, downwards as well as upwards, we would be convinced of the correctness of the holding. However, there is an utter absence of language in the act from which such an inference can be reasonably drawn. We conclude that this act did not affect the previous statutes upon the same subject-matter as it does not conflict with the terms thereof.

X.

The Legislature may declare the meaning of a previous act so as to bind the courts thereafter.

Primarily, it is the function of the courts to construe a law, yet Congress may construe a previous statute so as to declare the meaning thereof from that time afterward.

We may concede that it is the duty of Congress to say what the law shall be, and that likewise, it is the duty of the courts to say what the law is without doing violence to established principles. However that may be, it is well recognized that a legislative body may declare the meaning of a previous statute so as to bind the courts with reference to all transactions occurring thereafter. Furthermore, the legislature may even retroactively declare the meaning of a statute so as to bind the courts where no constitutional rights are involved.

U. S. vs. Freeman, 3 How. 556.
Stockdale vs. Insurance Co., 20 Wall. 323.
Koshkonong vs. Burton, 104 U. S. 668.
Mosle et al. vs. Bidwell, 130 Fed. 334.
Cope vs. Cope, 137 U. S. 682.
James vs. U. S., 202 U. S. 401.
Tiger vs. Western Investment Co., 221 U. S. 286.
Swigart vs. Baker, 229 U. S. 187.

In the case at bar, appellant contends that Congress continuously and consistently construed and declared the meaning of its previous acts by its subsequent ones bearing upon the question of the salaries of customs inspectors. Even admitting for the purpose of argu-

ment that the various acts passed by Congress, taken separately, would not support all the contentions of appellant, yet when Congress from time to time construed its own language, used in a previous statute, it is convincing that the legislature declared the meaning of such previous acts from time to time. The titles to these various acts throw considerable light upon the congressional intention.

Taking up for consideration again the Act of 1902 and the interpretation thereof by Congress in the Act of 1906, we find a positive legislative declaration that the Act of 1902 was intended to give to all inspectors at the port of New York an increase to Five ($5.00) dollars per diem. If such is not the conclusion to be deduced from the Act of 1906 what could have been in the legislative mind when it said "to pay the inspectors of customs of the port of New York the difference between the per diem salary of Four ($4.-00) dollars paid them during the months of October, November and December, 1905, and their *proper per diem salary for the same period (Five [$5.00] dollars per diem), in accordance with the Act of Congress approved December 16, 1902"?* (Italics ours.) Here is a direct legislative declaration of the meaning of the Act of 1902, and even should we concede that the inspectors at New York were not entitled mandatorily to Five ($5.00) dollars per diem prior to the Act of 1906, yet it is apparent that Congress declared the meaning of the 1902 act in no uncertain manner and in such a way as to bind the courts with reference to all transactions occurring thereafter. The very word "proper" means "correct," "rightful" and "lawful" and we can not ignore the meaning of this legislative declaration, as was done in the court below. The salaries of the New York inspectors, we contend, were legislatively fixed thereby.

The case of *James vs. The United States*, 202 U. S. 401, is on all fours with the case at bar in this respect. In the James case the salary of the Judges of the Supreme Court of the District of Columbia was fixed at Four Thousand ($4000) dollars by the Act of 1866. By an act passed June 30, 1891, Congress appropriated Five Thousand ($5000) dollars for the salary of each of said Judges. The appropriation act of the following year only appropriated Four Thousand ($4000) dollars for each of said officers. Mr. Justice James retired from that court in December, 1892, and was paid the said sum of Four Thousand ($4000) dollars during his retirement. After his death his administratrix brought suit for the additional One Thousand ($1000) dollars per annum. The case turned upon the proper construction of the Deficiencies Appropriation Act of March 2, 1895, as follows:

> "To pay the Chief Justice and five Associate Judges of the Supreme Court of the District of Columbia the difference between the rate of compensation received by them and five thousand dollars per annum for the fiscal year 1893."

It is to be noted how nearly similar the above language is to the Act of 1906, relied on by appellant in the case at bar. In fact, the Act of 1906 is stronger than the act just above quoted, as indicative of the legislative declaration of the meaning of a former statute, for the Act of 1906 said that the *proper* salary of inspectors of customs was Five ($5.00) dollars per diem, *in accordance with the Act of 1902*, whereas in the James case the subsequent statute omits to say that five thousand dollars was the proper salary of the District Judges.

In the James case both the Acts of 1891, appropriating Five Thousand ($5000) dollars for the salary of the Justices, and of 1892 appropriating only Four Thousand ($4000) dollars, contained the general clause repealing all acts and parts of acts inconsistent therewith.

This court, in giving judgment to the administratrix of Mr. Justice James, held in no uncertain language that Congress had the power to declare the meaning of a previous statute so as to bind the courts with reference thereto.

The language of the court, speaking through Mr. Justice White, at p. 407, clearly held that the Act of 1895 was to be given efficacy either as a congressional interpretation of the prior legislation or as a retroactive statute fixing the salary for the year 1893.

In the light of the above authorities how then can it be said that the Act of 1906 in the case at bar had no binding effect upon the Secretary of the Treasury? Clearly, Congress fixed the pay of inspectors at New York at Five ($5.00) dollars per diem, and when appellant was reduced to Four ($4.00) dollars per diem on July 1st, 1910, he was reduced below the statutory salary of his office.

Furthermore, when the Secretary of the Treasury increased certain inspectors at the port of New York to Six ($6.00) dollars per diem (R. 5), he designated that port as one in which the maximum salary of Six ($6.00) dollars per diem should obtain, and as he had no authority to discriminate between statutory officers in the same port, inherently, or by virtue of the Act of 1909, it follows that the statutory salary in New York became Six ($6.00) dollars per diem on July 1st, 1910, and that each and every inspector in that port became entitled to that rate of pay on and after that date.

XI.

The Executive order of March 3, 1913, did not change the statutory salary for inspectors at the port of New York.

The Executive order of March 3, 1913, reorganizing the customs service pursuant to the Act of Congress approved August 24, 1912, C. 355 (37 Stats. 434) did not affect the statutory rate of salaries for any of the inspectors at the port of New York.

While it is true that Congress, by the aforesaid Act of August 24th, 1912, authorized the President to reorganize the customs service, to abolish useless offices, to consolidate customs, collection districts, to reduce excessive rates of compensation, etc. (R.10), yet we submit that the President through the aforesaid Executive order did not attempt to fix the salaries of any of the customs officials therein named, except the salaries of the collectors of customs, as provided for in section IV thereof. The third paragraph of said order is as follows:

> "It is hereby ordered and communicated that the following plan shall be the organization of the customs service for the said fiscal year 1914, and unless otherwise provided by Congress the permanent organization of the customs service."

The order then proceeds to abolish certain collection districts, ports and sub-ports and to consolidate same into other collection districts, ports and sub-ports, to extend the provisions of the "immediate transportation act," to fix the salaries of collectors of customs in the various new districts as consolidated, to abolish

all fees hitherto paid to said collectors, to provide principal offices as headquarters for the respective districts, to empower surveyors to act where there are no collectors, to abolish all surveyors of customs except at certain ports, to appoint deputy collectors at various ports of entry, to provide for blank forms to be used in connection with the importation of merchandise, to regulate the delivery of merchandise from customs custody, to continue in the classified service, on a waiting list, all officers whose positions were abolished pursuant to the re-organization plan, and to provide for the usual protests theretofore authorized by law.

At the conclusion of the said order appears the following language:

> "Attached hereto is a detailed estimate of the expenses of the customs service under the re-organization above provided."

Then follows a list of officers and the estimated salaries for the various consolidated districts.

The Act of August 24th, 1912 authorized the President to reduce the total cost of collecting the revenue from customs to a sum not exceeding Ten Million One Hundred and Fifty Thousand ($10,150,000.) dollars. That the detailed estimate annexed to the Executive order was not intended to be a part thereof is manifest when we find that the said estimate called for expenditures of ten million three hundred eighty-one thousand seven hundred and sixty-six and 01/100 dollars, an amount greatly in excess of the sum mentioned in the said Act of August 24, 1912. The conclusion is inevitable that the Executive order is void if the estimate is to be regarded as a part thereof for the reason that the statute directed a reorganization within the following year that would entail a total cost not exceeding ten million one hundred and fifty thousand dollars while the estimates called for ex-

penditures greatly in excess thereof. In that event the statute would lapse because no valid order was issued within the time limitation therein provided.

At this point it may be well to examine the power conferred on the President by the said Act of August twenty-fourth, nineteen hundred and twelve, with reference to the reduction of excessive rates of pay to customs officers. The exact language of the statute is "to reduce excessive *rates* of compensation below amounts fixed by law or Executive order." The power therein conferred was one to reduce "*excessive rates* of compensation," it is to be noted. Conceding, for the sake of argument, that the estimate annexed to the Executive order is to be read as part thereof, and conceding further that the President, pursuant to the terms of the statute, could have legally reduced the statutory salary of the New York inspectors, which appellant contends was six dollars per diem, yet it is submitted that no attempt was made in the order to reduce the six dollar rate of pay, for provision was made therein for ninety inspectors at six dollars per diem. No power to discriminate between inspectors at a given port can be inferred from the statute, for the use of the word "*rate*" negatives any such inference. Had the President reduced the pay of all inspectors at New York to four dollars per diem pursuant to the act, appellant would be foreclosed from asserting any right to additional pay on and after the date when said order became effective. Wherefore, appellant concludes that even though the estimate should be read by this court as a part of the order, nevertheless, such order did not disturb the legal rate of six dollars per diem then obtaining in said port.

Furthermore, it is apparent that if it should be so held that the said estimate was intended to be a part of the order and thereby established the permanent organization of the customs service, a situation would

arise that would cause complete stagnation in the administration thereof. The Secretary of the Treasury, under such a plan, could not abolish any of the minor offices provided in said estimates, nor could he promote any minor employee unless a vacancy occurred by death, resignation or dismissal in one of the higher places. That such was not the intention of Congress, the President, or the Treasury Department is borne out by an examination of the appropriations by Congress for the customs service for the fiscal year nineteen hundred and fourteen and succeeding years.

The Act of June twenty-third, nineteen hundred and thirteen, C. 3 (38 Stats. 23), known as the Sundry Civil Bill, authorized the lump sum of ten million one hundred and fifty thousand dollars for collecting the revenue from customs, and in addition thereto, authorized the further sum of Two Hundred Thousand ($200,000.) dollars for the detection of frauds on the revenue, a further sum of One Hundred and Twenty-five Thousand ($125,000.) dollars, of which Sixty Thousand ($60,000.) dollars was to be immediately available, for the purchase of automatic scales, a further sum of Fifty Thousand ($50,000.) dollars for moieties and a further sum of Six Thousand ($6,000.) dollars for a motor boat for the customs service. The Act of July 29, 1914, C. 215 (38 Stats. 565), the same being the Deficiencies Appropriation Act, authorized the further appropriation of Three Hundred Thousand ($300,000.) dollars for collecting the revenue from customs for the fiscal year ending June 30, 1914. This makes a grand total of Ten Million Seven Hundred and Sixty-six Thousand ($10,766,000.) dollars for collecting the revenue from customs for the fiscal year 1914. Thus Congress ignored the $10,150,000. limitation of the Act of Aug. 24, 1912 and the order issued subsequent thereto and thereby impliedly re-

pealed that portion of the said Act of Aug. 24, 1912, which in fact had never been enforced.

For the fiscal year 1915, by the Act of August 1, 1914, C. 223 (38 Stats. 623), the Sundry Civil Act, Congress again appropriated Ten Million One Hundred and Fifty Thousand ($10,150,000.) dollars in a lump sum, a further sum of Two Hundred Thousand ($200,000.) dollars for the detection of frauds on the revenue, a further sum of Two Hundred Thousand ($200,000.) dollars for the Panama Pacific Exposition expenses in connection with the collection of customs, a further sum of Fifty Thousand ($50,000.) dollars and the remaining Sixty-five Thousand ($65,000.) dollars from the previous year for the purchase of automatic scales, and the further sum of Fifty Thousand ($50,000.) dollars for moieties, making a grand total of Ten Million Seven Hundred and Fifteen Thousand ($10,715,000.) dollars. Again Congress ignored the $10,150,000 limitation of the Act of Aug. 24, 1912.

For the fiscal year 1916, the Act of March 3, 1915, C. 75 (38 Stats. 836) authorized a total appropriation for the collection of the revenue from customs of Ten Million Three Hundred and Eighty Thousand ($10,380,000) dollars.

From these appropriation acts it is clear that Congress substituted a lump sum appropriation of Ten Million One Hundred and Fifty Thousand ($10,150,000) dollars for the customs service in lieu of the former permanent annual appropriation provided in Revised Statutes 3687, of Five Million Five Hundred Thousand ($5,500,000.) dollars and the additional appropriations that were usually added thereto under the Sundry Civil and Deficiencies Acts, as the needs of the service required, and supplemented this lump sum appropriation of $10,150,000. by such additional sums

as the Secretary estimated for other and various purposes.

Appellant therefore contends that the Executive order heretofore mentioned has no effect whatever upon the case at bar, as the subsequent appropriation acts constitute a legislative construction of the Act of August 24, 1912, and such legislative interpretation is in exact accordance with the interpretation placed thereupon by the Secretary of the Treasury.

In other words, if the estimate annexed to the Executive order of March 3, 1913, was a part thereof, then the permanent organization of the customs service was thereby established and the Secretary of the Treasury had no power, until same was granted by Congress, to make promotions from grade to grade in the clerical force, unless vacancies were caused by death, dismissal or resignation, he had no power to appoint additional minor officers even though the needs of the service demanded that he do so, he had no power to employ additional inspectors when needed and in fact, he was in the position of having to maintain a non-flexible organization that could not be varied except by congressional enactment. Such could not have been the intent of Congress. All that was intended was included in the Executive order proper, and these things were done pursuant to the order. The estimate has never been regarded as a part of the order, either by Congress or the Secretary of the Treasury, as we have heretofore shown.

We submit that the judgment of the court below should be reversed.

WILLIAM E. RUSSELL,
SEWARD G. SPOOR,
LOUIS T. MICHENER,
PERRY G. MICHENER,
Attorneys for Appellant.

APPENDIX.

HOUSE OF REPRESENTATIVES.

60th Congress, 1st Session. Report No. 1470.

SALARIES OF CUSTOMS OFFICIALS.

April 6, 1908.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

Mr. Dalzell, from the Committee on Ways and Means, submitted the following

REPORT.

(To accompany H. R. 21003.)

The Committee on Ways and Means, to whom was referred the bills, H. R. 247, 264, 292, 293, 294, 295, 3906, 4052, 4888, 9155, 9162, 9225, 11709, 11740, 13093, 13258, 13669, 13676, 16631, 16632, 16633, 16634, 16635, 16636, 16869, 17990, 18119, 18201 and 18205, having had the same under consideration, report to the House the accompanying bill (H. R. 21003) as a substitute therefor, and recommend that said substitute bill do pass.

There are twenty-nine bills before this committee to increase the salaries of various officials in the customs service.

Hearings were held on the subject for four days, and your committee reached the conclusion that, because of the change of conditions since the time the salaries were fixed, and in order to more nearly equalize salaries according to the responsibilities and

amount of labor of the officials, the Secretary of the Treasury should have authority to increase the salaries of certain classes of officials. The committee, therefore, reports this bill as a substitute for all the bills now pending before it on this subject. This bill carries no appropriation, but leaves the whole subject within the control of Congress each year. The appropriation for these salaries is carried in a lump sum in the general deficiency appropriation bill, based on the estimates of the Secretary of the Treasury, and these increases of salary can only be made when Congress appropriates the necessary amount. This bill merely authorizes the payment providing the appropriation is made.

LABORERS.

Section 1 authorizes an increase in pay of laborers to a maximum of $840 per annum. Laborers now receive various salaries, the highest being $770 per annum, which is the salary of the highest grade at the port of New York. There is at present no statute fixing the maximum compensation of this class of officials.

INSPECTORS.

Section 2 authorizes an increase of pay of inspectors to a maximum of $5 per day. The maximum salary of inspectors was fixed very early in the history of the Government at $3 per day. In 1864 this maximum was increased to $4 per day, and in 1892 the maximum for inspectors at the port of New York was increased to $5 per day, but the latter increase was not made effective, by making appropriation therefor, until two years ago. The present bill extends the

maximum of $5 to inspectors at ports other than New York. As this increase is urged for the purpose of compensating inspectors at ports of extensive area for expenditures of meals, car fares, etc., which it is claimed are necessary because their duties send them so far away from their homes, it is provided that where the maximum salary is paid no allowance shall be made for such expenses.

The hours of duty of inspectors is from sunrise to sunset, but they are often required to work late into the night. For night work inspecting cargoes they receive additional compensation, which is paid by the steamship companies, but for night inspection of passengers' baggage no extra compensation is allowed, and the taking of tips is punishable by instant dismissal. Inspectors are required to provide themselves with a uniform and to furnish a bond. The committee is informed that there are 370 inspectors at the port of New York and about the same number in all at the other ports.

DEPUTY COLLECTORS, ASSISTANT APPRAISERS, EXAMINERS.

Section 3 authorizes an increase of pay to deputy collectors, assistant appraisers, examiners of merchandise, examiners of tea, and examiners and special examiners of drugs to a maximum of $3,500 per annum. The section also provides that these officials shall be appointed by the Secretary of the Treasury, on the nomination of the principal customs officers in the district, instead of by the President, as is now provided. Deputy collectors now receive a maximum of $3,000; assistant appraisers a maximum of $3,000, except two at New York, who receive $3,500 (under a law enacted by the Fifty-ninth Congress); exam-

iners of merchandise, examiners of tea, and examiners and special examiners of drugs, receive up to $2,500. These officers are skilled specialists, and are a most important part of the system provided for the collection of custom duties. They are constantly being tempted to leave the Government service by offers of larger salaries.

DEPUTY NAVAL OFFICERS, DEPUTY SURVEYORS.

Section 4 authorizes an increase of pay of deputy naval officers and deputy surveyors to a maximum of $3,000. The present maximum pay of these officials is $2,500. While the duties of these officials are important, your committee does not consider that these duties entail as great responsibilities or demand as much technical skill as do those of the deputy appraisers, collectors and examiners, and we have, therefore, provided for them a somewhat less salary. This section also contains a provision for the appointment of these officers by the Secretary of the Treasury similar to the provision in section 3.

WEIGHERS AT SAN FRANCISCO.

Section 5 amends section 2746 of the Revised Statutes by adding the weighers to the list of officials at San Francisco to whom an additional compensation of 25 per cent may be paid. The effect of this section will be to authorize the increase of the pay of San Francisco weighers from $2,000 to $2,500. This section of the Revised Statutes increasing the salaries to $2,500 was enacted in 1866, and then included weighers. In 1877 the act was amended by adding several officers to the list, and at that time the words "and weighers" were dropped. After the San Francisco

fire an increase of salary of certain officials at San Francisco, including weighers, was recommended by the collector and approved by the Department. The increase was given to all the other officials, but it was discovered that the compensation of weighers was limited by law to $2,000. There were 5 weighers at New York, each receiving $2,500. There is but 1 weigher at San Francisco, having about 30 assistants and a large number of laborers under him.

ASSISTANT WEIGHERS.

Section 6 authorizes an increase of pay of assistant weighers to $4. They are now paid $3 at all ports except New York, where the salary is $4. This section allows the salary of these officials at such other ports where like conditions prevail to be made equal to that of the New York officials.

VIEWS OF THE MINORITY.

This bill is intended to increase the salary and allowances of a number of employees in the customs service. It is not necessary to specify the increases made, as the report of the majority sets these facts out in detail, giving the amount of the increase and the positions where the changes are made.

The undersigned do not contest the increase of salaries in reference to these particular positions, but are opposed to any increase of salary being made, or increase of expenditure allowed, in the customs service until there can be a general revision of the laws relating to the collection of the customs revenue, so far as the cost of collecting the same is concerned.

For a number of years the Treasury Department has

pointed out to Congress the fact that the cost of collecting the revenue in the customs service is far in excess of what it should be, and the Ways and Means Committee, on at least one occasion, has presented a bill to the House attempting to revise the cost of collecting the revenue and remedy some of the evils growing out of the same.

There is no reason why the cost of collecting the customs revenue should be greater than the cost of collecting the internal revenue. As a matter of fact, it should be less. In the internal revenue service it is necessary to maintain a force of men scattered through the entire Union; it is necessary to inspect thousands of small distilleries and breweries and maintain revenue officers and secret-service agents to see that the laws are not violated. On the other hand, the customs service is looked after by agents located in particular ports and the goods to be taxed are brought to them.

The cost of collecting the internal revenue embraces the following items:

Salaries and expenses of collectors, including pay of deputy collectors, clerks, etc., and including expenses incident to enforcing the provisions of the law taxing oleomargarine; salaries and expenses of revenue agents, surveyors of distilleries, gaugers, storekeepers, and miscellaneous expenses; paper for internal-revenue stamps and expenses of detecting and punishing violations of internal-revenue laws.

The expenses of collecting the revenue from customs includes all sums drawn from the appropriations made by Congress for the purpose. The money is expended for salaries, rents, labor in weighing and gauging and measuring imported merchandise, revenue boatmen, repairs, and other expenses incident to rented buildings, stationery, and the traveling expenses of

special agents; but it does not include expenses for revenue cutters, fuel, lights, water, furniture, janitors, etc., or for buildings owned by the Government, nor expenditures for erecting new buildings, all of which are paid for from specific appropriations made for this purpose.

Your attention is called to the material difference in the cost of collection and of the amounts collected in internal revenue and in customs revenue, from 1900 to 1905. They are as follows:

Internal and customs revenue, and expenses, etc.

Year Ended June 30—	Internal Revenue	Expenses of Collecting		Customs Revenue	Expenses of Collecting	
	Revenue	Total	Per Cent	Revenue	Total	Per Cent
1900	$295,327,926.76	$4,446,418.98	1.51	$233,164,871.16	$7,467,692.48	3.20
1901	307,180,638.77	4,404,986.68	1.43	288,595,455.99	7,718,418.82	3.23
1902	271,880,122.10	4,360,144 97	1.60	254,444,708.19	7,967,472.89	3.13
1903	230,810,124 17	4,496,479 28	1.95	284,479,581.81	8,468 710.19	2.98
1904	232,904,119.45	4,507,897.83	1.94	261,274,564.81	8,665,896 27	3.32
1905	254,095,740.85	4,238,184.70	1.85	261,798,856.91	9.115,499.44	3.48

As a matter of fact, there are some ports in the United States where the total receipts by the Government do not amount to $1,700 and where the expenses amount to as much as $5,800, with six men employed. There is one port in the United States where the collections for the fiscal year, June 30, 1905, amounted to only $5, and the expense of collecting the same amounted to $1,606. The cost of collecting the customs revenue is much greater in this country than it is in Great Britain.

For the year 1906 the revenue collected from customs in Great Britain amounted to $167,755,250; the cost of collecting was $4,545,311, or 0.027 per cent. In the United States for the same year the revenue collected amounted to $300,251,877, and the cost of collecting the same amounted to $8,997,669, or an average of 0.03 per cent.

Under these circumstances we believe it to be the duty of the House of Representatives, before granting an increase in the cost of collection of the revenue of any nature or description, to enter upon a revision of the entire system of collection; reorganize and readjust the force in charge of collecting the same to meet modern conditions. If this is done, we are satisfied that a great reduction in the cost of this service can be obtained without any material injury to the service, and our views in this matter are sustained by the repeated recommendations of the Treasury Department.

Under these circumstances, we are opposed to the passage of the bill at the present time.

O. W. UNDERWOOD.
CHAMP CLARK.
J. M. GRIGGS.

CALENDAR NO. 202.

60th Congress, 1st Session. Report No. 180.

SENATE.

MAXIMUM COMPENSATION OF INSPECTORS OF CUSTOMS.

February 6, 1908.—Ordered to be printed.

Mr. Hopkins, from the Committee on Commerce, submitted the following

REPORT.

(To accompany S. 4066.)

The Committee on Commerce, to whom was referred the bill (S. 4066) authorizing the Secretary of the Treasury to increase the compensation of inspectors of customs, having considered the same, report thereon with a recommendation that it pass with an amendment striking out "and Philadelphia" and inserting in lieu "Philadelphia and San Francisco."

The bill has the approval of the Treasury Department, as will appear by the following letter:

Treasury Department, Office of the Secretary,
Washington, January 24, 1908.

Sir: I have the honor to acknowledge the receipt of a letter from the clerk of your committee, dated the 17th instant, inclosing a copy of a bill (S. 4066), authorizing the Secretary of the Treasury to increase the maximum compensation of inspectors of customs, not to exceed $6 per diem, at the ports of New York, Chicago, Boston, and Philadelphia, and such other ports as he may designate, and to advise you that this Department sees no objection to the passage of the bill.

Respectfully,

GEO. B. CORTELYOU,
Secretary.

The Chairman Committee on Commerce,
United States Senate.

In the Supreme Court of the United States

OCTOBER TERM, 1918.

JAMES H. COCHNOWER
v.
THE UNITED STATES. } No. 80.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is one of a class of claims numbering approximately 300, and the appeal is from the judgment dismissing the petition. For many years appellant had been an inspector of customs at the port of New York. Previous to July 10, 1910, the compensation of inspectors at that port had been fixed at $5 per day by the Secretary of the Treasury. On that day he reorganized and reclassified the entire inspection service. Under this reorganization some of the inspectors receiving $5 a day were increased to $6 and others reduced to $4 a day, the remaining inspectors continuing at the compensation of $5 a day. Appellant was placed in the class reduced to $4, and he now claims $2 per day additional compensation from July 1, 1910, to June 30, 1915.

94005—18

The sole question to be resolved here is whether the Secretary had authority to fix appellant's per diem compensation at $4.

Appellant contends that the Secretary of the Treasury had no authority in law to reduce his compensation, but was required by the act of March 4, 1909 (35 Stat. 1065), to increase it to $6 per day under section 2 of said act, which is as follows:

> That the Secretary of the Treasury be, and he is hereby, authorized to increase and fix the compensation of inspectors of customs, as he may think advisable, not to exceed in any case the rate of $6 per diem, and in all cases where the maximum compensation is paid no allowance shall be made for meals or other expenses incurred by inspectors when required to work at unusual hours.

The Government maintains that said section 2 of the act of March 4, 1909, left the question of the increase or decrease of inspectors' salaries solely within the discretion of the Secretary of the Treasury. Hence appellant can not recover for any salary in excess of $4 per diem as fixed by the Secretary.

ARGUMENT.

FIRST.

The act of March 4, 1909, gave the Secretary of the Treasury the discretionary power to fix appellant's salary of $4 a day.

It should be noted at the outset that the salaries of inspectors of customs prior to and under the act of March 4, 1909, were paid from a lump-sum appropriation made annually for collecting the revenue

from customs. This appropriation was disbursed under the direction of the Secretary of the Treasury. The Committee on Ways and Means (Report 1470, 60th Cong., 1st sess.), after considering many bills and having hearings on the subject for four days, reported a bill (the act of March 4, 1909), as a substitute for all the bills pending, stating that:

> This bill carries no appropriation, but leaves the whole subject within the control of Congress each year. The appropriation for these salaries is carried in a lump sum in the general deficiency appropriation bill, based on the estimates of the Secretary of the Treasury, and these increases of salary can only be made when Congress appropriates the necessary amount. This bill merely authorizes the payment providing the appropriation is made.

The report is a supplementary explanation of that which appears on the face of section 2 of the act of March 4, 1909, and is a reiteration of the history of the appropriation for this item in previous years. Congress realizing the intricacies and difficulties in administrative departments, such as the collector of customs under the Secretary of the Treasury, was loath to restrict his discretion in administrative matters. Hence it appropriated a lump sum annually based on his estimates. For the execution and design of the administrative machinery it looked to the Secretary to devise ways and means and apply the appropriation thereto subject only to a maximum wage. This was the intention of the committee when it proposed section 2 of the said act of 1909, permitting

the Secretary to increase and fix the compensation of inspectors of customs when he thought it "advisable." If it had been mandatory upon the Secretary to pay all the inspectors six dollars per day Congress would not have used the word "advisable."

Again, it permitted him to pay a maximum "not to exceed" in any case the rate of six dollars per diem. Had the Secretary been required to increase appellant's salary from five dollars to six dollars, Congress would not have used the phrase, "not to exceed," since such language obviously fixes only a maximum and does not require mandatory action. Section 2 states in substance that if the Secretary deemed it advisable he might "increase and fix" the compensation. It nowhere declares that he could not decrease. Since it appropriated to him a lump sum to be used upon his estimates the only inference is that section 2 was intended to permit him to name the salaries and the inspectors subject to a maximum of $6 per diem.

Again, were section 2 mandatory, requiring the Secretary of the Treasury to pay appellant $6 per day, it would not have declared that, "in all cases where the maximum compensation is paid no allowance shall be made for meals or other expenses incurred by inspectors when required to work at unusual hours." The irresistible inference from this language is that inspectors were not in all cases to be paid $6. They were only to be paid $6 where the Secretary thought it advisable and where no allowance was to be made "for meals or other expenses incurred by inspectors." If all inspectors were not

to be paid $6, the query arises, Upon what theory does appellant predicate his demand for this wage?

To all of that part of appellant's argument in relation to long-continued and contemporaneous construction, the Government's answer is that the same is irrelevant for the reason that section 8 of the said act of 1909, repealed "all laws and parts of laws inconsistent with this act." The obvious purpose of the repealing clause was to give the Secretary of the Treasury the authority to reclassify the inspectors and to reorganize that body, and in doing so to relieve him from whatever construction might possibly have been put upon his acts or those of his predecessors under previous legislation, the only limitation being a maximum salary of $6 a day, with the power to declare who should receive this compensation and under what conditions.

SECOND.

The legislative acts and action thereunder prior to the passage of the act of March 4, 1909, did not preclude the Secretary of the Treasury from fixing appellant's pay at four dollars per diem.

The court below (Record 11) and the Comptroller (22 Comp. Dec., 445) held that the said act of 1909 was designed to supersede prior legislation on the subject. The Government is in accord with this view. However, the legislative acts and action prior to 1909 do not preclude the reduction made, for in them there is nothing restricting the discretionary power of the Secretary of the Treasury to employ

inspectors at less than $5 per day, or to reduce the salary of those receiving $5 a day.

All such statutes, including the act of March 4, 1909, are set out in the opinion of the Court of Claims (pp. 8–9).

Section 2733, Revised Statutes, provides that each inspector should receive $3 per day, but the act of 1881 (21 Stat., 429) expressly authorizes the Secretary of the Treasury to employ inspectors at less than $3 per day.

Section 2737, Revised Statutes, authorized an increase not to exceed $4 per day if the Secretary of the Treasury deemed it advisable, and the act of 1902 (32 Stats., 753) authorized a further increase for the port of New York not to exceed a maximum of $5 per day in the discretion of the Secretary of the Treasury. The fact that subsequent to 1902 the Secretary had allowed the maximum rate of $5 to inspectors did not cause his repetition of action in this respect to crystalize into a mandatory rule, thereby diminishing his authority to pay less.

In 1905 the question arose as to whether the Secretary of the Treasury was authorized by the act of 1902 to pay a rate of $5 per day to all inspectors at New York regardless of extra work and expense, the Secretary of the Treasury having reduced the pay of inspectors at New York to $4 per day. The $5 basis was restored on January 1, 1906, the Secretary having been advised by the comptroller that it was within his discretion to allow the rate of $5 per day to all inspectors regardless of extra work or expense. (Comptroller's manuscript opinion of December 28, 1905.)

By the acts of June 30, 1906, and March 4, 1907, Congress appropriated a sum sufficient to pay the difference between the $4 and $5 rates for the months of October, November, and December, 1905.

It is now contended by appellant that the use by Congress in the acts of 1906 and 1907, appropriating the difference between the four and five dollar rate for the three-month period before mentioned, of the phrase, "their proper per diem salary for the period ($5 per diem) in accordance with the act of Congress approved December 16, 1902," constituted a legislative declaration fixing a flat rate of $5 per day which the Secretary of the Treasury was without authority to reduce. This is so repugnant to the express terms of the act of 1902 as to render it untenable in the absence of more specific evidence that Congress really intended to repeal the act of 1902 and substitute for the Secretary's exercise of discretion a definite salary of $5. Had such been the intent of Congress the act of 1902 would have been repealed and a flat rate of $5 per day specified. That Congress did not intend by the acts of 1906 and 1907 to repeal the act of 1902 is obvious, because these acts specifically refer to the act of 1902 and state that the appropriation is made to pay the difference between the $4 per day already received by the inspectors for October, November, and December, and their *proper* per diem "*in accordance with the act of Congress approved December 16, 1902,*" thereby reaffirming the act of 1902 and indicating that the

compensation of customs inspectors should be gauged by its provisions. Undoubtedly what Congress meant by the word "proper" was that under the act of 1902 $5 per day was a proper salary provided the Secretary of the Treasury specified this amount as the *proper* compensation.

The statutes on this subject prior to 1909, and the actions of the several Secretaries thereunder, preclude any limitation on the Secretary's discretion beyond a certain maximum salary to be allowed inspectors; nor do they restrict the Secretary's power to reduce inspectors' salaries below $4 a day. Whatever the history of this matter may have been prior to the act of March 4, 1909, is, we reiterate, immaterial since the said act on its face "was designed to supersede prior legislation and action under said prior legislation."

In his petition (Record 3) appellant claims $2 per diem from July 1, 1910, to and including June 30, 1915. In view of the action of the President under the act of Congress of August 24, 1912 (37 Stats. 434), whereby reorganization and reclassification of inspectors was made effective July 1, 1913, it is evident that the plaintiff's claim, if any, must be confined to the period between July 1, 1910, and July 1, 1913. The plan in detail is set forth in the opinion of the court. (Record 10.)

The conclusion of the whole matter is that the Secretary of the Treasury had the power under the act of March 4, 1909, with the lump sum appropriation,

to reorganize and reclassify the classes of inspectors, and being restricted only to a maximum salary by said act was within the discretion lodged in him when he fixed appellant's salary at $4 per day.

Respectfully submitted.

HUSTON THOMPSON,
Assistant Attorney General.
HARVEY D. JACOB,
Attorney.

○

FILED
FEB 11 1919
JAMES D. MAHER,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1918.

No. 80

JAMES H. COCHNOWER,

Appellant,

vs.

THE UNITED STATES.

Appeal from the Court of Claims.

BRIEF OF ARGUMENT

On Appellant's Motion for an Amendment of the Judgment.

WILLIAM E. RUSSELL,
LOUIS T. MICHENER,
PERRY G. MICHENER,
Attorneys for Appellant.

THE REPORTER CO., WALTON, N. Y.
New York Office: [illegible] Broadway, Room [illegible]. Phone [illegible] Barclay.
Brooklyn Office: [illegible] Fulton Street, Room [illegible]. Phone [illegible] Main.
[illegible]

Index.

	Page
Certification by Appellant's Counsel	1
Synopsis of Brief of Argument	2
I. Prevention of Further Litigation	2
II. The Two Branches of This Action	4
III. The Opinion of This Court	5

Supreme Court of the United States

OCTOBER TERM, 1918.

JAMES H. COCHNOWER,
Appellant,
vs.
THE UNITED STATES.

No 80

APPEAL FROM THE COURT OF CLAIMS.

Appellant's Motion for an Amendment of the Judgment.

Brief of Argument.

The appellant moves the Court to so amend its judgment herein as to make it direct specifically what judgment shall be rendered by the Court of Claims:

First, by directing the Court below to render judgment for appellant at the rate of two dollars per day from July 1st, 1910, to June 30th, 1915, inclusive.

Second, or if the foregoing does not represent the conclusion arrived at by this Court, by directing the Court below to render judgment for appellant at the rate of one dollar per day from July 1st, 1910, to June 30th, 1915, inclusive.

Appellant's counsel hereby certify that in their opinion this motion is well founded in law, is in the interest of justice, is to prevent further litigation and is not interposed for the purposes of delay.

WILLIAM E. RUSSELL,
LOUIS T. MICHENER,
PERRY G. MICHENER,
Attorneys for Appellant.

BRIEF OF ARGUMENT.

Synopsis.

1. Prevention of further litigation.

2. The two branches of this case, one squarely decided and the other decided only by implication.

3. The opinion of this Court:

(a) The opinion clearly holds that the Secretary of the Treasury had no power to reduce the salary of the office of Inspector of Customs, which had been fixed at five dollars per diem at the Port of New York.

(b) But it is contended by counsel for the Government that the opinion and judgment do not dispose of appellant's claim that he should have been increased to six dollars per diem under the Act of March 4, 1909.

(c) All questions of law can be disposed of finally by a suggested amendment of the judgment or by a supplemental opinion.

I.

Prevention of further litigation.

Differences concerning the opinion and judgment of this Court and their bearing upon other cases of like character, in law and fact, now pending in the court below and awaiting the judgment of this Court in this case, have developed between counsel for appellant on the one hand and counsel for the Government on the other.

Appellant's counsel contend that the opinion and judgment of this Court are in his favor on both branches of the case, but opposing counsel denies

that and contends that the opinion and judgment are in favor of appellant only on the point that the Secretary of the Treasury had no power to reduce the salary of the office of inspector. Furthermore, opposing counsel asserts that he will litigate even this point in one of the other cases pending in the court below, appealing the case to this Court if need be, because, as he claims, this Court did not pass upon the Act of December 16, 1902, and prior acts. He insists that the only way, in view of the opinion and judgment of this Court, to get the questions of law fully passed upon here is to litigate another of the like cases in the court below and then appeal the case. Counsel for appellant are opposed to those views because all of the acts of Congress bearing upon the question of inspector's salaries, including the Act of Dec. 16, 1902, and prior acts, were before this Court in the findings and opinion of the Court below as well as in appellant's brief, and it is strongly contended on behalf of appellant that this Court considered *all* of the acts that counsel for the Government now claims were not passed upon. For these reasons counsel for appellant have advised the filing of this motion in the belief that the result will be to establish clearly all legal rights involved and relieve both this Court and the Court below of much litigation in other pending cases of the same nature in fact and in law.

II.

The two branches of this action.

There are two clearly defined branches of this action:

First, for one dollar per day from July 1, 1910, that being the amount of the unlawful daily reduction when appellant was reduced from $5 to $4 per diem, and

Second, for an additional dollar per day from July 1, 1910, because the Act of March 4, 1909, intended an increase to $6 per diem for the inspectors and because the salary was increased to and fixed at said sum of $6 per diem when the Secretary of the Treasury increased the salary of some of the inspectors at New York on July 1, 1910.

There was a failure to increase appellant's compensation to the intended $6 per diem and there was a reduction of $1 per day from the fixed rate of $5. The total damage is $2 per day, $1 for failure to increase and $1 for the reduction.

The citations are, petition, R., 1-3; findings, R., 5-7, opinion below, R., 7-10.

III.

The opinion of this Court.

(a) It will be observed that the opinion does specifically dispose of the reduction branch of the case and in appellant's favor. Opposing counsel concedes this but says that the litigation must be resumed even on that branch in the other cases pending, for reasons heretofore assigned. He still contends that the Secretary of the Treasury had the power to make the reduction here complained of and he argues that appellant did not hold an office the salary of which had been fixed by law. Were it not for the statement made by opposing counsel that the like cases now pending must be litigated anew, counsel for appellant would not deem it necessary to advert to this point, for it seems too clear for argument that this Court did hold that the salary of inspectors in New York had been previously fixed at $5 per diem and that the Secretary of the Treasury received no power or authority under the Act of March 4, 1909, to reduce this fixed salary.

We regret exceedingly that the attitude of opposing counsel makes it necessary to bring this subject to the attention of the Court, but we do so in the firm belief that a way will be found to make *specific* what is *now claimed* to be *general* in terms, both in the opinion and the judgment, and thus avoid further litigation of the pending cases.

(b) We are obliged to concede that there is some merit in the contention of opposing counsel that the opinion and judgment do not dispose, *in specific terms,*

of the remaining branch of the case—the failure to affirmatively increase the compensation of appellant to $6 per day—and we feel sure that the Court of Claims would hold against the claim for increase if the judgment of this Court stands as at present.

We read the opinion of this Court, page 3, as holding that effect is to be given the phrase "increase and fix the compensation" as used in the Act of March 4, 1909. To restore appellant to the salary he was enjoying before July 1, 1910, viz, $5 per day, and *to deny him* the $6 per day contemplated by the Act of March 4, 1909, and provided for by the appropriations by Congress (see appellant's brief, pp. 31-33), would be to deny effect to the phrase just above quoted. We understand the Court to hold appellant entitled to the increase, for, in construing the word "fix" in the above collocation, the opinion (p. 3), says:

> "But the instant signification of the word is the opposite of change—it declares stability and confirmation—and, giving it this sense, it is the natural complement of the power to increase, establishes the increase (fixes it) thereafter as the legal compensation."

However, in view of the attitude of opposing counsel, we deem it to be in the interest of justice and necessary to prevent further litigation to respectfully move this Court to dispose of this remaining branch of the case in specific terms.

(c) In view of the foregoing, we respectfully submit that all of the law questions in this and the other pending cases of like nature can be finally disposed of by an amendment of the judgment, or by a supplemental opinion, or by both. A direction to the Court

below to enter judgment for appellant for such amount per day as this Court has decided him to be entitled to, together with a short supplemental opinion would, we think, avoid the further litigation that is now threatened.

Respectfully submitted,

WILLIAM E. RUSSELL,
LOUIS T. MICHENER,
PERRY G. MICHENER,
Attorneys for Appellant.

RECEIVED
MAR 10 1919
SUPREME COURT U.S.

Supreme Court of the United States

OCTOBER TERM, 1918.

No. 80.

JAMES H. COCHNOWER,
Appellant,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

APPELLANT'S BRIEF IN RESPONSE TO APPELLEE'S PETITION AND BRIEF FOR REHEARING.

WILLIAM E. RUSSELL,
LOUIS T. MICHENER,
PERRY G. MICHENER,
Attorneys for Appellant.

Supreme Court of the United States

OCTOBER TERM, 1918.

No. 80.

JAMES H. COCHNOWER,
Appellant,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

Appellant's Brief in Response to Appellee's petition and brief for rehearing.

Appellant opposes the petition of the appellee for a rehearing in this cause and begs leave to submit a short reply to the appellee's petition. We propose to discuss briefly the following points:

SYNOPSIS.

1. No necessity for a rehearing. *No new law questions presented by the Appellee's petition,* except as to whether an inspector is an officer or not.

2. In its original brief the Government relied upon the Act of March 4, 1909.

3. An amendment of the judgment is all that is necessary to remove the threat of further litigation made by the Government.

4. The Government now seeks to change its whole plan of argument.

5. The Findings of Fact show that the reorganization of 1910, wherein appellant was reduced, was made under the provisions of the Act of March 4, 1909.

6. The Acts of 1906 and 1907 dispose of the Government's contentions with regard to the Act of 1881.

7. The Executive Order of 1913 was fully discussed in the original briefs of both sides and in the opinion of the court below.

8. The salary of the *office of inspector* at New York had been *fixed by law* at $5 per diem prior to the Act of March 4, 1909.

I.

Appellant submits that there is no necessity for a rehearing in this cause, as all of the points now raised by the appellee in the petition for a rehearing were carefully argued in the original briefs and upon the oral argument before the court. We will make one exception to the foregoing statement, and that is, that the appellee now urges that an inspector of customs is not an *officer* but a mere *employee*. This point was not raised in the original briefs, nor at any other time in the progress of this case. We are indeed surprised that the Government should now contend that an inspector of customs is not an *officer*, but on the contrary is a mere *employee*. We can conclusively answer this contention and dispose of the same very briefly.

We will refer the court to the earliest statute upon this subject, the Act of July 31, 1789, set forth on page 5 of our original brief. This act specifically refers to an inspector as an *officer* of the customs. Also see Act of March 2, 1799, Act of

April 29, 1864, section 2737 Revised Statutes, Act of March 4, 1909, pages 6, 7, 8 and 10 of our original brief. See also Revised Statutes, title 34, chapters 5 and 10, with particular reference to sections 2878, 3402, 3059, 3061 and 3071. The last three sections mentioned confer upon these *officers* the very unusual powers of search, seizure and arrest without warrant.

Furthermore, the various sections of the Revised Statutes above cited contain on their margins, citations to the Act of March 2, 1799, the organic law of the customs service. The specific question was before this court as to whether or not an inspector was an *officer* of the customs in the case of *Stewart* vs. *The United States,* 17 Howard, 116.

The court will please note the language of the opinion at the foot of page 127 of the *Stewart* case. Further cases holding that an inspector is an *officer* of the customs are, *U. S.* vs. *The Barracouta,* 42 Fed., 160, and *U. S.* vs. *McEwan,* 44 Fed., 594, Federal Cases Nos. 6674, 14490 and 15820. These statutes and decisions put the question beyond controversy.

WITH THE FOREGOING QUESTION DISPOSED OF, THE APPELLEE'S PETITION SUBMITS *NO QUESTION OF LAW, NO STATUTE* AND *NO CITATION* THAT DID NOT APPEAR IN THE ORIGINAL BRIEFS. Furthermore, the Government did not elect to argue this cause orally before this court, but submitted upon its original brief, and we maintain that the appellee, having had its day in court, is now in no position to petition for a rehearing, unless it is able to submit something that was not before the court when the case was decided.

II.

In the original brief the Government elected to stand squarely on the Act of March 4, 1909, relying on the opinion of the court below (R. 11). If the court will refer to the Government's original brief, bottom of page 5 and middle of page 8, it will be found that the Government insisted that the Act of March 4, 1909, repealed all previous legislation and superseded all previous practices. This argument was advanced by the Government obviously for the purpose of avoiding the effect of appellant's argument in his original brief as to the rules of long-continued contemporaneous construction.

III.

Furthermore, there is now pending before this court a motion on the part of the appellant for an amendment of the judgment which, it is submitted, will clarify the whole situation and render a new hearing unnecessary. We submit that this court has decided this case in all its branches, and had it not been for the threat on the part of the appellee that further litigation would necessarily follow in like cases pending in the court below, there would have been no necessity for even a motion to amend the judgment. As suggested in the motion to amend the judgment, a short supplemental opinion, or an amendment of the judgment, will so clarify the situation as to prevent the further litigation that the appellee suggests in its petition for a rehearing.

IV.

The Government now seeks to shift its defense, not having prevailed upon the line of argument that it elected to stand upon previously, and with

amazing frankness, now admits that its original contentions were wrong.

The Government sets forth in its petition for a rehearing what is claimed to be *all* the statutes on the subject. We may say, by way of parenthesis, that each and every one of the statutes now set forth in the Government's petition appeared in the findings and opinion of the lower court (R. 6, 7, 8, 9 and 10) and in appellant's original brief (pages 5 to 11) and in the Government's original brief (pages 2, 6, 7 and 8). We note significantly *that the appellee fails, however, to include the two very important Acts of June 30, 1906, and March 4, 1907,* set forth in full in appellant's original brief, page 9. The Government now seeks to avoid discussion of these two acts for the reason, as it seems to us, that they amount to a Congressional declaration and interpretation of the Act of December 16, 1902, copied on pages 8 and 9 of appellant's original brief.

In passing, we might remark that the language of the Act of 1902 as construed and declared by Congress in the Acts of 1906 and 1907, was repeated in the act now under consideration, namely, the Act of March 4, 1909. It follows that Congress used this same language in the Act of 1909 in the same sense as it was used in the Act of 1902, the meaning thereof having been unequivocally declared by Congress in the said Acts of 1906 and 1907.

We have no doubt that this court considered everything in the original record, and that both branches of the case were intended to be decided, and were so decided, as we argue on page 2 of our brief in support of the motion to amend the judgment.

V.

We would call the court's attention particularly to the finding III (R. 5) that the reorganization in June 1910, which led to appellant's demotion, was made *"under the provisions of the Act of March 4, 1909, 35 Statutes, 1065,"* the statute now under consideration. The court below, in its opinion (R. 8), top of the page, also held that the aforesaid reorganization was made under the provisions of the said act. With these findings of fact in the record, how then can the Government seek to avoid the effect of the Act of March 4, 1909, as construed by this court? Therefore, even though it were permissible for the Government to shift its position, it cannot go behind the findings.

VI.

The Government pays considerable attention to the Act of March 3, 1881, in its petition for a rehearing. This statute was set forth in full in our original brief, page 8, and was discussed at length on pages 17 and 18. Whatever the correct interpretation of the said Act of 1881 may be, it cannot and does not affect the case at bar. When the Secretary of the Treasury increased the inspectors at New York to $5 per diem on January 1, 1903, pursuant to the Act of December 16, 1902, and subsequently attempted to reduce them to $4 per diem on October 1, 1905, he found that he had no power to reduce, once having increased and fixed the compensation. The court will please refer to finding 5 (R. 6); near the bottom of the page appears the following statement: *"Thereafter being advised that he could not make the reduction,* he restored the said compensation on or about the 8th day of January, 1906, effective January 1, 1906." Shortly thereafter Congress passed the

Acts of June 30, 1906, and March 4, 1907, heretofore referred to, which construed and declared the meaning of the Act of December 16, 1902, to be that the *proper* per diem of the inspectors of New York was $5, and these acts appropriated sufficient money to pay these inspectors who had been unlawfully demoted the several amounts that had been deducted from their pay during the period of demotion.

We reiterate that when the Congress repeated the language of the Act of 1902, as construed by the Acts of 1906 and 1907, in the Act of March 4, 1909, that the same meaning was intended for the later act as Congress expressly declared for the earlier one.

VII.

The Government now contends that this court did not consider the executive order of 1913, although the same appeared in the opinion of the court below (R. 10), as well as in appellant's original brief, pages 10 and 11, and in appellee's original brief, page 8. The said executive order was discussed at length in appellant's original brief, pages 44, 45 ,46, 47, 48 and 49, and we may add, appellant's counsel devoted considerable time to the discussion thereof on the oral argument. We, therefore, deem it unnecessary to say anything further with reference thereto, for we feel sure that this court duly considered each and every part thereof.

VIII.

As we understand the Government's contention in the petition for a rehearing, it is still maintained that the Secretary had the power to reduce the salary of this appellant as he saw fit. The Government urges upon this court that the Secre-

tary could change the duties of this appellant, could abolish his position and force him to accept any conditions of employment that the Secretary might name. We do not for one moment dispute the power of the Secretary to remove or to reduce this appellant, or any other officer in the customs service, from one position to another. What we have found fault with in the instant case, is that the Secretary attempted to reduce the *salary of an office* when same had been *fixed by law*. If this court had not intended in its opinion to hold that appellant held an *office the* salary of which had been *fixed by law*, then the Government's contention might have some force. In order to hold that there was no right of reduction, as this court has held, the court had to determine first whether appellant held a position to which there was salary *fixed by law*. We are not dealing at all with a case involving the discretion of the Secretary of the Treasury. We concede that the court will not interfere with an administrative officer in the exercise of his discretionary power. However, when a salary has been fixed by law the administrative branch of the Government may not increase it or decrease it (*Glavey* vs. *U. S.*, 182 U. S., 595; *U. S.* vs. *Andrews*, 240 U. S., 90).

Therefore it follows that this court did consider the acts prior to the Act of 1909, and did hold that the salary of the office of inspector in the Port of New York had become fixed at $5 per diem, and could not be reduced by administrative action.

Respectfully submitted,

WILLIAM E. RUSSELL,
LOUIS T. MICHENER,
PERRY G. MICHENER,
Attorneys for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

JAMES H. COCHNOWER
v.
THE UNITED STATES. } No. 80.

APPEAL FROM THE COURT OF CLAIMS.

PETITION OF THE UNITED STATES FOR A REHEARING.

The United States, being aggrieved by the judgment of this honorable court rendered January 13, 1919, reversing the judgment of the Court of Claims in the above-styled cause, respectfully present this their petition for a rehearing, and in support thereof submit the following:

I.

The appellant, an inspector of customs at the Port of New York, sued in the Court of Claims. He had been paid at the rate of $5 per day until July 1, 1910, when the Secretary of the Treasury reduced his compensation to $4 per day, at which rate he has since been paid.

His claim was—

(1) That as the result of an act of Congress passed in 1909 and executive action taken thereunder, he was entitled to $6 per day beginning July 1, 1910

and that, therefore, he is entitled to recover $2 per day from that date.

(2) That if he is not entitled to an increase from the date mentioned, the Secretary of the Treasury had no power to reduce his compensation, and that he is therefore entitled, at all events, to recover one dollar per day.

The Government denies (1) that he was entitled to recover at all, (2) that he was, in any event, entitled to more than $5 per day, and (3) that his recovery, if any, should be for a period extending beyond July 1, 1913.

This court, assuming that the case turned entirely upon the construction of the act of 1909 above referred to, held that that act did not confer the authority to reduce the claimant's compensation, and reversed and remanded the case, without, however, determining whether the effect of the act in question was or was not to increase the claimant's compensation, and also without determining whether the claimant was entitled to recover anything for services rendered after July 1, 1913.

II.

The act of March 4, 1909 (35 Stat., 1065), above referred to was as follows:

> That the Secretary of the Treasury be, and he is hereby authorized to increase and fix the compensation of inspectors of customs, as he may think advisable, not to exceed in any case the rate of six dollars per diem, and in all cases where the maximum compensation

> is paid no allowance shall be made for meals or other expenses incurred by inspectors when required to work at unusual hours.

Shortly after the passage of this act the Secretary of the Treasury undertook to classify the inspectors at the port of New York, as a result of which the salaries of some were increased to $6 per day, and of others, including the claimant, reduced to $4 per day.

As stated above, the action of this court in reversing the judgment of the Court of Claims was based exclusively upon the conclusion reached that there was nothing in the act of 1909 which expressly conferred authority to reduce salaries, or from which such authority could be implied. That act was treated as superseding all prior legislation which would otherwise have had any bearing on the case, and apparently the court did not consider the question as to whether the Secretary of the Treasury had the power to reduce salaries independent of and without reference to the act of 1909. This was probably induced by the statement in the Government's brief that the act of 1909 superseded prior legislation on the same subject which therefore became immaterial to the present issue. But this statement was based on the contention then made that the act of 1909, by authorizing the Secretary to "increase and fix" salaries, gave the authority to *reduce* as well as *increase*, and hence covered the whole field of fixing the compensation of inspectors. The court, however, rejected this construction of the act and

held expressly that it did not confer power to reduce salaries. The holding was that that act dealt alone with the subject of *increasing* salaries.

The rule followed by the court, that the act of 1909 superseded all prior legislation *covering the same subject* is, of course, correct. And had the Government's contention as to the scope of that act been sound, all prior acts relating to the compensation of inspectors of customs would have been superseded. All the law on that subject would have been embraced in the last act, and it would not have been necessary to refer to earlier acts for any purpose. But the Government was mistaken as to the scope of the act of 1909. It did not confer authority to decrease salaries. It did not contain either an express or implied prohibition against such decreases. It did not deal with that subject at all. If any prior statute prohibited the reduction of salaries, the prohibition was not removed. If, under existing law, the Secretary had the right to reduce them, it was not taken away. Laws on the subject of increasing salaries were superseded. Those on the subject of decreasing salaries remained in force. The pertinent inquiry, then, is whether, at the time this act was passed, the Secretary of the Treasury already had the power to reduce the claimant's compensation. If he did, that power could not be affected by the passage of an act which did not deal with that subject. An examination of prior statutes, therefore, which, under the construction placed upon the act of 1909 by the Government in its brief, was

immaterial, becomes, now that the court has construed the act differently, not only material, but necessary, to determine the present issue.

Prior to the Revised Statutes the only limitation upon the power of the Secretary to fix salaries was that they should not exceed a certain maximum. This gave him full power to fix the minimum.

It has always been the policy of Congress to provide for the collection of customs by appropriating a lump sum, to be expended by the Secretary of the Treasury under such restrictions as were from time to time imposed. The salaries of some of the officials were fixed by law. But no act was ever passed prescribing the number of inspectors to be appointed or employed, or, with a single exception, fixing their compensation at any definite sum. On the contrary, the various acts merely authorized the Secretary to employ such inspectors as should be required, and to pay them such compensation as he deemed proper, within such limitations as Congress had prescribed, provided this could be done out of the lump sum appropriated. With the one exception referred to, and which was soon abandoned, Congress has never evinced any purpose to control compensation of inspectors, except by fixing a maximum which should not be exceeded. With the exception above referred to, no act has ever said that not less than any particular sum should be paid. On the contrary, the language invariably used has been a sum "not to exceed" a given amount. With this limitation the salaries of inspectors have been

left to the discretion of the Secretary. The appropriations made by Congress have, of course, been based upon estimates made by the Secretary as to what would be needed. In this way Congress doubtless has known, from the estimate submitted, what compensation was being paid to inspectors, and when it has from time to time authorized an increase in the maximum salaries, its action has been either for the purpose of authorizing the Secretary to increase his estimate of the lump sum required, or it has been the basis for an increased appropriation by Congress.

A reference to the various statutes on this subject will verify the statement above made, that Congress has concerned itself alone with fixing a maximum compensation, or a sum beyond which the Secretary should not be authorized to go.

The act of July 31, 1789 (1 Stat., 45), provided that each inspector should be allowed *a sum not exceeding* $1.25 per day. The act of March 3, 1797 (1 Stat., 503), provided, in lieu, that inspectors should receive *a sum not exceeding* $2 per day, and the act of March 2, 1799 (1 Stat., 707), contained the same provision. The act of April 26, 1816 (3 Stat., 306), provided for an increase "of fifty (50%) per cent upon the sums allowed as compensation to inspectors." In the case of an inspector who was receiving $2 the compensation would thus be increased to $3. This remained the law until 1864. The act of April 29, 1864 (13 Stat., 61), authorized the Secretary of the Treasury to increase the compensation of inspectors

in such ports as he might think it advisable so to do by adding "to the present compensation of said officers a sum not exceeding one dollar per day." The increase was not to extend beyond July 1, 1865, but was continued by an act of March 2, 1865 (13 Stat., 460), until July, 1866, and finally indefinitely continued by the act of July 23, 1866 (14 Stat., 208).

Revised Statutes did fix a minimum as well as a maximum.

This was the condition of the law when the Revised Statutes were adopted. The entire law on the subject was carried into the Revised Statutes as two sections as follows:

> SEC. 2733. Each inspector shall receive for every day he shall actually be employed in aid of the customs, three dollars; and for every other person that the collector may find it necessary and expedient to employ as occasional inspector, or in any other way in aid of the revenue, a like sum, while actually so employed, not exceeding three dollars for every day so employed.
>
> SEC. 2737. The Secretary of the Treasury may increase the compensation of inspectors of customs in such ports as he may think it advisable so to do, and may designate, by adding to the present compensation of such officers, a sum not exceeding one dollar per day.

Under these sections, clearly, the compensation of regular inspectors was fixed at $3 per day, subject only to a provision that the Secretary of the

Treasury might pay an additional $1 per day at such ports as he might designate. The compensation of persons employed as occasional inspectors was still left to the discretion of the Secretary, with the single limitation that it should not exceed $3 per day. The effect was that with respect to regular inspectors the Secretary could fix their compensation at any amount he saw fit, provided it did not exceed $4 or fall below $3 per day. For the first time, then, Congress fixed a minimum compensation below which he could not go.

Policy of fixing a minimum definitely abandoned in 1881 and never again resorted to. The Secretary's power to reduce salaries at will was thus restored. Congress has never fixed a maximum more definitely than by saying it shall not exceed a stated amount. And there is nothing, either in the act of 1909 or in any earlier act, which prevented the Secretary from reducing claimant's salary.

Obviously, however, the plan of fixing a minimum was soon thought to be unwise, for the act of March 3, 1881 (21 Stat. 429), contained a proviso "that hereafter the Secretary of the Treasury may appoint inspectors of customs at a compensation less than three dollars per day when, in his judgment, the public service will permit." Since, before the passage of this act, the Secretary of the Treasury had the power to fix the compensation at anything from $3 to $4, it can not be doubted that, after the passage of the act abolishing the minimum of $3, he had the right to fix it at any amount whatever which did not exceed $4 per day.

No further change in the law was made until the act of December 16, 1902 (32 Stat. 753), which authorized the Secretary of the Treasury "to increase the compensation of inspectors of customs at the port of New York, as he may think advisable and proper, by adding to their present compensation a sum not exceeding one dollar per day, which additional compensation shall be for work now performed by them at unusual hours, for which no compensation is now allowed, and shall include work performed by said inspectors at night in examining passengers' baggage, and also as reimbursement for expenses incurred by them for meals," etc.

This was the state of the law when the act of March 4, 1909, was passed. The minimum compensation fixed by Revised Statutes 2733 had been abolished and nothing had ever been substituted for it. Increases had been allowed within the discretion of the Secretary at the port of New York. No act referring to the maximum compensation to be paid had ever fixed a definite amount. In every case the language had been "not exceeding" a certain amount. The Secretary was therefore authorized to fix any compensation he might see fit, provided it did not exceed $4 per day at all ports except the port of New York, at which it might be as much as $5 per day. This, as we have seen, resulted from the fact that the regular compensation was not to exceed $3 per day, unless at the port of New York the Secretary should make it not exceeding $5, and at all other ports not exceeding $4.

In this state of the law the act of 1909 dealing, as this court has held, alone with the subject of increasing salaries and fixing the amount of such increases, was passed. Applying as it did to all inspectors, it superseded all acts which had authorized increases, either at particular ports or at all ports. Of course when the act of 1909 authorized the Secretary to go as high as $6 for any inspector in his employ, a former provision that he might allow as much as $5 at New York, or $4 anywhere else, was no longer of any importance or effect.

Since the act of 1881 repealed the only act which ever attempted to fix a minimum below which the Secretary should not go, it can not be said that there has been anything in the law which prohibited the Secretary from at any time fixing the salary of an inspector at any amount he saw fit, provided he did not exceed the maximum limit then fixed by law, unless it can be said that the use of the words "not exceeding" implied also an intention to express the same idea that would be expressed by the words "not less than." In other words, to sustain the appellant's contention it is necessary to hold that these two expressions, which ordinarily are the exact opposites of each other, mean, in this particular statute, exactly the same thing.

Unless, therefore, there is something in the nature of the office or employment itself which prevents the Secretary from reducing the compensation, he had full authority to reduce it before the act of 1909 was passed, and since that act contains no prohibition

against reduction, he had the same power after the passage of the act. There is no statute which creates an office of inspector of customs with a fixed tenure. There is to be only such a number of inspectors as may be required to meet the needs of the service The acts of Congress do not speak of the position of an inspector as an office, but as an employment. He is not appointed to an office, but is employed by the Secretary. His employment implies, in the first instance, the right to receive the compensation agreed on at the time of his employment. It does not imply any obligation on the part of the Government to continue the employment longer than his services are needed, or to pay the same salary for any definite time, or beyond the time when the services are deemed to be worth a less sum. The most that he can claim, even under the Civil Service law, is that having been employed, he is entitled to continue in the service as long as the position he is filling is retained, and to receive the compensation which from time to time the Government pays for the service rendered in that position. The Secretary alone fixed the number of inspectors to be employed. Undoubtedly he might at any time abolish the position held by a particular inspector. The right to abolish the position necessarily includes the right to change its duties, or to change the compensation to be paid for the service rendered. When such changes are made the inspector may retain his position, but only with the rights which accrue from the changed conditions.

It is therefore most earnestly insisted that when the court held that the act of 1909 did not itself give authority for reducing salaries, the question still remained whether any other statute prevented such action. And it is submitted that the policy of Congress from the beginning has been to commit the matter of compensation of inspectors to the discretion of the Secretary of the Treasury, subject only to a maximum amount beyond which Congress forbade him to go.

It is respectfully submitted that, doubtless being misled by the general statement in the Government's brief that the act of 1909 superseded prior legislation on the same subject, the court overlooked the fact that this statement could have no application, when it had been decided that the act of 1909 did not deal with the subject of decreasing salaries, and that the case should be reheard to the end that the court may now, upon an examination of this prior legislation, hold that, independently of the act of 1909, the Secretary of the Treasury had the right to reduce appellant's compensation in 1910.

III.

Again, the opinion of the court leaves open, for further controversy in the Court of Claims and another appeal to this court, the determination of the appellant's claim that the effect of the act of 1909 and the executive action under it was to entitle the appellant to $6 per day. This question is believed to be so fully disposed of by the argument in

the Government's brief heretofore filed that it is not deemed necessary now to say anything further. But it is submitted that this question is fairly presented upon the record, and for the purpose of preventing unnecessary litigation in the future ought to be decided.

IV.

It also appears that regardless of appellant's rights after the passage of the act of 1909, his right to receive more than the $4 per day allowed terminated, in any event, when the reorganization authorized by the act of August 24, 1912 (37 Stat. 434) went into effect. This act was passed for the purpose of reducing the expenses of the customs service, and applying to the entire service, authorized the President "to reduce excessive rates of compensation below amounts fixed by law or Executive order." Under this act the President, by an order effective July 1, 1913, reorganized the service with the same schedule of salaries for inspectors at the Port of New York which the Secretary of the Treasury had adopted after the passage of the act of 1909. Even if it should be held that the reduction made in 1910 was without authority of law, it would seem plain that this reduction, when continued in effect in 1913, became lawful and proper under the act of 1912. It is therefore submitted that in any possible view of the case the appellant's right to receive either $5 or $6 per day terminated on July 1, 1913. This question, though presented in the briefs of counsel on both sides, was not determined by the opinion delivered, and hence is left open for further controversy in the Court of Claims and to be the basis for another appeal to this court.

V.

While the amount involved in this case is small, the question is one of importance to the Government, since upon its decision depends the right of a large number of inspectors to recover similar amounts in cases now pending and hereafter to be brought in the Court of Claims, which suits will involve in the aggregate a very large sum.

VI.

For the reasons above stated the United States respectfully prays that this Honorable Court grant a rehearing, and that upon such rehearing the questions left undecided as above pointed out be determined, and that upon a consideration of the state of the law prior to the passage of the act of 1909, the judgment of the Court of Claims dismissing the claimant's petition be affirmed.

ALEXANDER C. KING,
Solicitor General.
WILLIAM L. FRIERSON,
Assistant Attorney General.

As counsel for the United States in the above-styled cause we certify that in our opinion the foregoing petition to rehear is well founded in law, is in the interest of justice, and is to prevent further litigation, and is not interposed for the purposes of delay.

ALEXANDER C. KING,
Solicitor General.
WILLIAM L. FRIERSON,
Assistant Attorney General.

O

COCHNOWER *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 80. Argued December 16, 1918.—Decided January 13, 1919.

Primarily, the creation of offices and the assignment of their compensation is a legislative function; and the fact and the extent of any delegation of it must clearly appear.

The Act of March 4, 1909, c. 314, 35 Stat. 1065, authorizing the Secretary of the Treasury "to increase and fix" the compensation of inspectors of customs, as he may think advisable, etc., did not empower him to decrease their salaries.

51 Ct. Clms. 461, reversed.

THE case is stated in the opinion.

Mr. William E. Russell, with whom *Mr. Seward G. Spoor, Mr. Louis T. Michener* and *Mr. Perry G. Michener* were on the brief, for appellant.

Mr. Assistant Attorney General Thompson and *Mr. Harvey D. Jacob,* for the United States, submitted.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Appeal from the Court of Claims involving the construction of an Act of Congress passed March 4, 1909, c. 314, 35 Stat. 1065, entitled "An Act Fixing the compensation of certain officials in the custom service, and for other purposes." This case is concerned particularly with § 2, which provides as follows: "That the Secretary of the Treasury be, and he is hereby, authorized to *increase* and *fix* [italics ours] the compensation of inspectors of customs, as he may think advisable, not to exceed in any case the rate of six dollars per diem, and in all cases where the maximum compensation is paid no allowance shall be made for meals or other expenses incurred by inspectors when required to work at unusual hours."

The Court of Claims construed the provision as authorizing the Secretary to decrease the salary of inspectors and dismissed Cochnower's petition that presented a claim for the difference between the salary at which he was serving and that from which he was reduced by the Secretary, in contest of the Secretary's power. From the judgment of the court this appeal was taken.

Cochnower's petition shows that he served in the customs service in various capacities and at various salaries, which he details, from 1879 to June 13, 1908, when he was appointed day inspector at $5.00 per diem, at which rate he served until July 1, 1910, when he was reduced to $4.00 per diem, at which rate he is now serving.

The case is one simply of statutory construction and depends primarily on the words "increase and fix" which we have italicized in our quotation of § 2. In opposition to the Court of Claims' view of them, counsel for Cochnower have indulged in a wide range and have been elaborate in citation and review of prior legislation and the decisions of the courts upon it. Counsel for the

Government have confined themselves to narrower limits and even urge that the argument based on "long-continued and contemporaneous construction . . . is irrelevant for the reason that section 8 of the said act of 1909 repealed all laws and parts of laws inconsistent" with it, and that its obvious purpose was to relieve the Secretary from whatever construction might have been put upon his acts or those of his predecessors under previous legislation. In other words, as we understand the Government, the Act of 1909 is to stand by itself and was intended to be and must be taken as the measure of the Secretary's power after its enactment; that it could not be limited or opposed by prior legislation, for that had been repealed; nor by prior practices, for they had been superseded, and a new rule of authority and practice pronounced. We may accept this as the gage of the Government and consider how far the act is a grant of authority to the Secretary.

Primarily we may say that the creation of offices and the assignment of their compensation is a legislative function. *Glavey* v. *United States*, 182 U. S. 595; *United States* v. *Andrews*, 240 U. S. 90. And we think the delegation of such function and the extent of its delegation must have clear expression or implication. The Act of 1909 does give a power to the Secretary, but the power is not absolute; it is expressed with qualification. The Government's contention makes it absolute, having no limit but the discretion of the Secretary. The contention gives the qualification no purpose, makes it simply a confusion or clumsiness of words. But why are they to be so regarded? Congress did not have to disguise its purpose or furtively accomplish it. And if Congress accidentally fell into the equivocal, the resulting uncertainty must be resolved by the application of the simple rule of considering all the words of a statute in their proper dependence. Reverting then to the statute, we discover that it was at pains to

express clearly the power to "increase." If it had been intended to give the power to "decrease"—an accurately opposite power—it would have been at equal pains to have explicitly declared it; and thus the unlimited discretion in the Secretary contended for by the Government would have been simply and directly conferred and not left to be guessed from a circumlocution of words or to be picked out of a questionable ambiguity. We say questionable ambiguity because its existence can be readily disputed. If it exists at all it exists in the word "fix" in the collocation "fix the compensation." But the instant signification of the word is the opposite of change—it declares stability and confirmation—and, giving it this sense, it is the natural complement of the power to increase, establishes the increase (fixes it) thereafter as the legal compensation. And this, we think, is the proper construction, direct, intelligible and adequate.

It is, however, urged that the act implies minimum and maximum salaries, especially of inspectors, and also the power of classification of inspectors. We are not called upon to dispute it. The fact or the power does not enlarge the authority to increase salaries into an authority to decrease them. The power given can otherwise be accommodated.

We think, therefore, that the Court of Claims erred in dismissing the petition, and its judgment is reversed and the case remanded for further proceedings in conformity with this opinion.

So ordered.